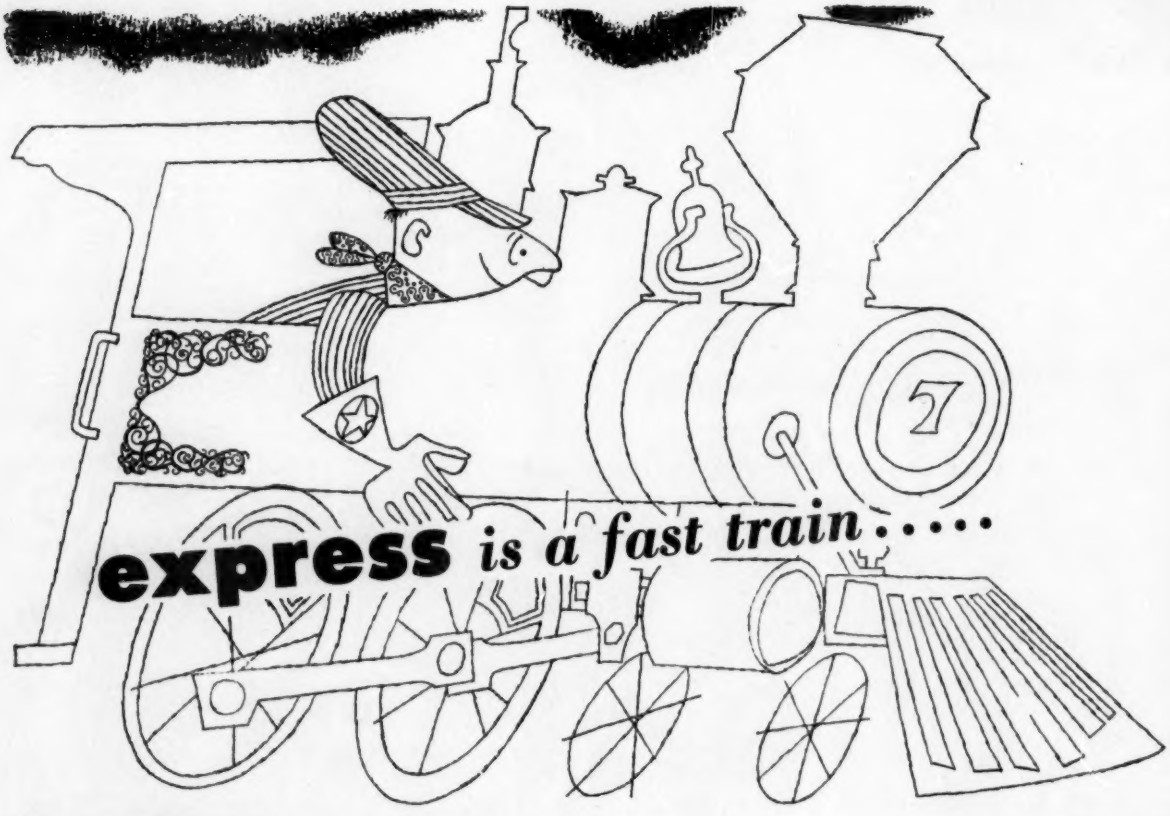
American Bar Association Journal

March 1953



but **Express** *is a newspaper*

The circulation manager of The Express might use the express to get his state edition out on time, but no one would be confused as to which carried headlines and bylines, which carried passengers and packages.

The capital makes the difference . . . the capital "E" that designates The Express as a newspaper.

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THE COCA-COLA COMPANY

Contents

MARCH, 1953

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
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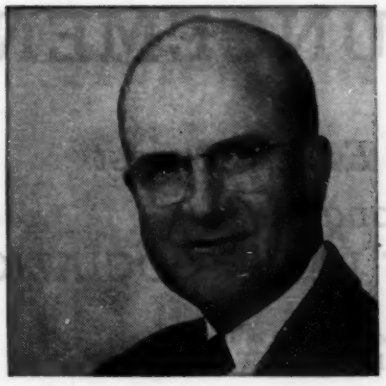

The President's Page

Robert G. Storey

[redacted]

■ The unparalleled success of the industrial system of the United States is due to many things, not the least of which has been the enormous expenditure of money and effort in the field of industrial research. Patient scientific search for new processes and improved products is now standard procedure in modern industry. If you would find the key to our industrial progress, do not look for it in the mine or the smoking factory, but in the laboratories where men of science seek the unknown, and seek for it again, and again.

An able scientist of the last century wrote, "The days are past when an engineer can acquit himself respectably by the aid of mother wit alone or of those constructive instincts which in the past led our predecessors to such brilliant results." We are learning in this century that the inquisitive process of the researcher is equally required in all the social sciences and especially in the law.

Nor have we fallen far behind the times. Our law schools have accepted the responsibility of constant study of the body of the law. The journals are filled with significant works, supported by patient and accurate research. The associations of lawyers in the several states, too, have carried on comparable studies in the field of practical law problems. And in the national area the American Law Institute, the Commissioners on Uniform State Laws, and the American Bar Association have served the nation well in improving the laws by which the nation is governed. All this has been done, and well done as far as it goes, but with funds that are negligible as compared with the enormous expenditures and ample facilities which have been available to the physical sciences and most of the social sciences for research.

With the establishment of the American Bar Center the lawyers of the United States will greatly improve the studies and research of bar association objectives. The recent Treasury Department approval of tax deductible contributions to the American Bar Foundation should encourage gifts to complete the Center and to further research to fulfill the long-range objectives of the American Bar Association. It will also assist the Sections and Committees of the Association to better accomplish their mission.

The American Bar Center will perform three vital functions. The first task of the Center will be to assemble a complete library of bar information, containing all publications of bar associations, voluntary as well as integrated, in the United States and Canada, and ultimately in the principal countries of the free world. The work of these associations, reflected in their respective publications, will be catalogued and indexed. Any member of the Association, or any Committee or Section, may have access to this great fund of knowledge. For lawyers, research must begin in the library.

The second task of the Center will be to serve as a clearing house for research programs undertaken by law schools, legal centers and state and local bar groups in the areas of interest to the American Bar Association, such as the long-range objectives. The Center will be charged with ascertaining all significant developments in legal research throughout the nation and with providing each organization with information on similar work undertaken by other organizations. Successful programs in one locality may be adopted by other localities; mistakes made in one association can be avoided elsewhere. Co-ordination of research in bar association objectives will produce a more efficient utilization of the efforts of lawyers to serve the profession, the states and the nation.

A third task of the Center will be to initiate specific research programs approved by the House of Delegates. Such programs may be financed through special grants by bar associations, individuals and foundations. Some may require the co-ordinated action of local, state and the American Bar Associations. Particularly will this be true with respect to such objectives as the maintenance and improvement of our independent judicial system and legal profession. Perhaps now is the opportune moment to initiate and stimulate a nation-wide research in the over-all improvement of criminal justice and the legal profession's role therein. Similar programs of great scope and importance will arise from time to

(Continued on page 205)

ANNOUNCEMENT

of

1953 Essay Contest

Conducted by

AMERICAN BAR ASSOCIATION

Pursuant to terms of bequest of
Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted:

On or before April 1, 1953.

Amount of Prize:

Twenty-five Hundred Dollars.

Subject To Be Discussed:

"Guarantees of Free Speech vs. Right to Fair Trial."

The question contemplates the situation created by federal and state constitutional provisions on free speech that every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and the provisions that one accused of crime shall have a right to a speedy and public trial by an impartial jury. Often comments on criminal trials by the press, radio and television seem to jeopardize or destroy the right of the accused to a fair and impartial trial. Comment which creates a clear and present danger to the administration of justice constitutes contempt of court. A solution of the problem involves more than a definition of what constitutes contempt of court. It includes effective measures to permit proper comment without jeopardizing the rights of the accused.

Eligibility:

The Contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1953 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this Contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the American Bar Association.

AMERICAN BAR ASSOCIATION

1140 North Dearborn Street Chicago 10, Illinois

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

American Bar Association

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Board of Editors, American Bar Association Journal, listed on page 220

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RECENT LEGAL NOTES

American Bar Association Journal

★

March 1953

• Divorced wife as creditor

When a wife gets a settlement in connection with a divorce or separation, she commonly becomes a contract or judgment creditor of her husband. If her husband predeceases her, the settlement may have unforeseen and in some cases unhappy consequences both for the wife and for others who might share in the husband's estate. Whether the settlement is in a lump sum or provides for periodic payments for the husband's or the wife's life is often an important factor. An illustration of the trouble which can be caused by a settlement providing for periodic payments for the wife's life is given by *Grimley's Estate*, a recent New York case. The husband died testate after setting up an escrow fund to provide for periodic payments to the wife under a judgment of separation. But as the wife was a creditor of the husband, her right to payments was a charge against the estate, the full amount of which would not be known until her death. There was a possibility that the escrow fund might not be sufficient to meet all the payments. Consequently, a large part of the estate, destined for legatees other than the wife, had to be held in reserve.

Another complication: The wife had filed an election to take against the will. (New York's Decedent Estate Law, Section 18, gives the surviving spouse a right to take at least an intestate share, subject to many conditions.) The Surrogate, in effect, held that the sums she would receive from the escrow fund and the reserve had to be credited against her elective share. Hence the effectiveness of her election, and the amount passing to her thereunder, could not be determined until her death. [*Grimley's Estate*, 200 Misc. 901; 113 N.Y.S. 2d 65; 201 Misc. 1107].

Similarly, in Kansas, a wife was allowed to enforce against her husband's estate a divorce settlement contract awarding her a stipulated sum per month for her life, or until she remarried. [*Shideler Estate*, 242 P.2d 1057].

The inheritance tax aspect of the wife-as-creditor situation proved favorable to the wife in an Illinois case. There, the husband bequeathed the wife $50,000 in accord with a divorce decree which provided further that, if the husband failed to make such bequest, the wife would be allowed all her dower and property rights in his estate.

The wife was held to be a creditor of the estate, which freed her bequest from inheritance tax liability [*Greiner*, 107 N.E. 2d 836].

• Wage-hour criminal offenses cut down to "courses of conduct"

In a criminal charge against an employer for violations of the Wage-Hour Law, the Government alleged thirty-two separate offenses: six minimum wage violations, one in each of six separate weeks; but only as to one employee in any one week, and only as to three employees in all; twenty overtime violations, one in each of twenty separate weeks, involving a total of eleven employees; and six record-keeping violations, one each as to two employees and two each as to two other employees. Since the maximum fine for a violation is $10,000, the Federal District Court (W.D., Mo.) assumed that the charges, if proved as made, would authorize a fine of $320,000. The District Court dismissed the charge as to all but three of the alleged offenses, one under each heading.

The Supreme Court affirmed [*United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, December 22, 1952]. Considering the statute to be ambiguous on the point, the Court sought to give it a reasonable interpretation. It rejected the Government's contention that the Wage-Hour Law authorized punishment for "each failure to comply with each duty imposed by the Act as to each employee in each workweek and as to each record required to be kept". Rather the Court concluded that an offense under this law is a "course of conduct". In this case, for example, the minimum wage violations were "a course of conduct" making up one offense; the overtime violations were another; and the record-keeping

violations a third. The Court indicated, however, that there could be more than one illegal "course of conduct" under a single heading. For example, an employer might commit two offenses, following two improper "courses of conduct" both involving underpayments: one for making "a wholly unjustifiable managerial decision that a certain activity was not work and therefore did not require compensation"; and the other to pay piece workers less than the amount required in terms of hourly rates.

• Corporation pays for $260,000 proxy fight

In 1950, the rule was first announced that under Delaware law successful insurgents in a proxy fight for the election of directors could pay their expenses out of the corporate treasury [*Steinberg* v. *Adams*, S.D.N.Y. (1950) 90 F. Supp. 604].

Now New York has adopted the same rule in the second case in which the problem has been considered [*Rosenfeld* v. *Fairchild Engine & Airplane Corp.*, S. Ct., Nassau Cty (1952) 116 N.Y.S. 2d 840]:

Principal stockholder felt that an employment contract between the corporation and one of its directors was unfair to the corporation. When his attempt to get the board to modify the contract failed, he formed an insurgent stockholders' committee which proposed its own slate of directors for election.

Both management and the insurgents undertook expensive campaigns—management spent $33,968, the insurgents $127,556. The insurgents won, the disputed contract was cancelled, and the expenses of both groups were paid out of the corporate treasury.

• Trustees' commissions—long-term compensation

More than three years after his appointment as trustee under a will, the trustee was paid his commissions on the trust principal. He reported the payment as long-term compensation and figured the work extended from the date of his appointment to the date of payment [Sec. 107(a), IRC].

Held: Trustees' commissions can be the subject of long-term compensation, but the relief provision cannot be applied here, because the principal commissions, when added to the income commissions, did not constitute 80 per cent of total compensation received for acting as trustee. There is but one appointment as trustee, one trust and one set of services—that of administering the trust—and both sets of commissions must be added together in determining total compensation. It was immaterial that the state probate court computed the commissions in two parts—on income and on principal; that was merely the prescribed statutory method of figuring total pay for one job [*Kingsford*, USDC, N.J., November 24, 1952].

• New family partnership rules

The Bureau of Internal Revenue has issued its proposed regulations under the provisions of the 1951 Revenue Act dealing with family partnerships [IRC, §§191, 3797(a)(2)]. The two main features of the 1951 amendment are these: (1) The Code now provides for the recognition of partnership interests created by gift, where capital is a material income-producing factor in the business. (2) The Code now authorizes the Commissioner to reallocate partnership income so as to attribute reasonable compensation to the donor of a partnership interest for his services.

Capital interest: What is a capital interest in a partnership that can be created by gift? First, capital (in contrast to professional skill) must be a material income-producing factor. Second, the proposed regulations say that a capital interest in such a partnership means "a proprietary interest in assets used in the partnership business, which interest is distributable to the owner of the capital interest upon his withdrawal . . . or upon dissolution or liquidation. . . . The mere right to participate in the earnings of a partnership is not a capital interest. . . ."

Make Your Hotel Reservations NOW!

1953

ANNUAL MEETING

Boston, Massachusetts,

August 23-28, 1953.

Headquarters—Hotel Statler

(All space now exhausted.)

The Seventy-Sixth Annual Meeting of the American Bar Association will be held in Boston, August 23 to 28, 1953. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal*.

Attention is called to the fact that many interesting and worthwhile events of the Meeting will be arranged, as usual, to take place on Saturday and Sunday, August 22 and 23, preceding the opening sessions of the Assembly and House of Delegates, August 24.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $10.00 registration fee for *each lawyer* for whom reservation is requested. **Be sure to indicate *three* choices of hotels, and give us your definite date of arrival, as well as probable departure date.**

Reservations will be confirmed approximately ninety days before the Meeting convenes.

More detailed announcement with respect to the making of hotel reservations may be found in the January issue of the *Journal*, page 10. In addition to the hotels listed therein, we have also secured accommodations at Hotels Touraine and Shelton.

Nominating Petitions

California

■ The undersigned hereby nominate R. E. H. Julien, of San Francisco, for the office of State Delegate for and from the State of California to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Joseph C. Kimble, of Fresno;

Graham L. Sterling, Jr., Walter L. Nossaman, Dana Latham, George Bouchard, Maynard J. Toll, George R. Richter, Jr., James C. Sheppard, Joseph D. Brady and J. Stanley Mullin, of Los Angeles;

Frank S. Richards and Edwin A. Heafey, of Oakland;

Clyde H. Brand and Ralph N. Kleps, of Sacramento;

Walter C. Fox, Jr., James Farraher, Maurice D. L. Fuller, Howard J. Finn, Eugene M. Prince, George Herrington, James D. Adams, Samuel B. Stewart, Jr., and John K. Hagopian, of San Francisco;

John Gerald Driscoll, Jr., of San Diego;

Emil Gumpert, of Stockton.

Kentucky

■ The undersigned hereby nominate Marcus C. Redwine, of Winchester, for the office of State Delegate for and from the State of Kentucky to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Simeon S. Willis and H. R. Dysard, of Ashland;

William J. Deupree, of Covington;

Henry Meigs, of Frankfort;

H. Church Ford and Thomas K. Shuff, of Georgetown;

W. L. Matthews, Jr., R. W. Keenon, Richard J. Colbert, King Swope and W. L. Wallace, of Lexington;

Robert P. Hobson, Ernest Woodward, W. H. Fulton, John A. Fulton, J. Paul Keith, Jr., Elbert Skiles Jones and Stephen S. Jones, of Louisville;

R. Howard Smith and Carl Ebert, of Newport;

James W. Wine, Jr., E. N. Venters, William J. Baird and J. Peyton Hobson, Jr., of Pikeville;

Victoria B. Gilbert, of Shelbyville.

Massachusetts

■ The undersigned hereby nominate Allan H. W. Higgins, of Boston, for the office of State Delegate for and from the State of Massachusetts to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Harry K. Mansfield, Andrew H. Cox, H. Brian Holland, Wilson C. Piper, Robert L. Spang, Warren E. Carley, Allen O. Eaton, Reginald Heber Smith, George W. Wightman, Lucius E. Thayer, D. L. Brown, John T. Powell, James D. St. Clair, Edmund Burke, Roger D. Swaim and Grafton L. Wilson, of Boston;

Erwin N. Griswold, Arthur E. Sutherland, Jr., Louis Loss, Austin W. Scott, A. James Casner, John M. Maguire and George K. Gardner, of Cambridge;

Richard H. Field and W. Barton Leach, of Weston.

New Mexico

■ The undersigned hereby nominate Floyd W. Beutler, of Taos, for the office of State Delegate for and from the State of New Mexico to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

John P. Dwyer, Robert J. Nordhaus, Richard C. Losh, Theodore E. Jones, Owen B. Marron, Merritt W. Oldaker, A. H. McLeod, Richard M. Krannawitter, Scott H. Mabry and J. R. Modrall, of Albuquerque;

Cyril Roy Anderson, of Carlsbad;

Max N. Edwards, N. Randolf Reese, U. N. Rose, C. Melvin Neal and William J. Heck, of Hobbs;

G. T. Hanners, of Lovington;

A. K. Montgomery, Harry L. Bigbee, Fletcher A. Catron and Henry J. Hughes, of Santa Fe;

R. Howard Brandenburg, of Taos;

Stephen W. Bowen, Paul L. Billhymer and James L. Briscoe, of Tucumcari.

New Mexico

■ The undersigned hereby nominate Herbert B. Gerhart, of Raton, for the office of State Delegate for and from the State of New Mexico to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Fred E. Wilson, Merritt W. Oldaker and Scott H. Mabry, of Albuquerque;

Don G. McCormick, Eugene C. Paine and E. K. Neumann, of Carlsbad;

Lynell G. Skarda, Fred M. Standley and Dee C. Blythe, of Clovis;

W. C. Whatley, LaFel E. Oman, William Byron Darden and Jess D. Weir, of Las Cruces;

T. E. Mears, Jr., of Portales;

William H. Darden and G. W. Robertson, of Raton;

T. T. Sanders, Jr., of Roswell;

Howard F. Houk, Lyle E. Teutsch, Jr., John C. Watson, Henry J. Hughes and J. O. Seth, of Santa Fe;

Paul Billhymer and Stephen W. Bowen, of Tucumcari

North Carolina

■ The undersigned hereby nominate Louis J. Poisson, Sr., of Wilmington, for the office of State Delegate for and from the State of North Carolina to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Luther T. Hartsell, Jr., L. T. Hartsell and John Sharpe Hartsell, of Concord;

Buford F. Williams, of Lenoir;

Don A. Walser, of Lexington;

L. R. Varser, Ozmer L. Henry and Henry A. McKinnon, of Lumberton;

Robert W. Proctor, of Marion;

W. H. McElwee, of North Wilkesboro;

T. F. Ellis, Oscar Leach, Edward L. Cannon, Leon Brassfield and Murray Allen, of Raleigh;

(Continued on page 226)

The Lawyer and Commercial Arbitration:

The Modern Law

by Stanley Mosk • Judge of the Superior Court of California (Los Angeles)

■ For centuries the law frowned upon agreements to arbitrate—arbitration awards were held to be unenforceable and at best only nominal damages were awarded for a breach. The situation is much different now, in a world where business is complex and many businessmen, for one reason or another, prefer to submit their differences to an arbitrator instead of resorting to the courts. Judge Mosk discusses the modern law on the subject and argues that arbitration deserves a place in our legal system.

■ At the very moment national publications were focusing attention on the congested condition of court calendars in some metropolitan areas, advocates of arbitration as an organized means of resolving commercial conflict were for the first time extending their movement across the continent.

In November, the American Arbitration Association, with its offices in New York, joined with the Los Angeles Bar Association, the Junior Bar Conference, the Law School of the University of California at Los Angeles, and the U.C.L.A. Extension and Institute of Industrial Relations, to sponsor a two-day conference on arbitration on the Los Angeles campus, the first session of its kind in the Far West. The first day was devoted to commerce, the second to labor.

From a surprising number of substantial businessmen in attendance at the conference came expressions highly critical of delays and costs of litigation, and indicating a willingness to consider arbitration more favorably in the future. This, of course, gave pause to the lawyers present, for while by training and impulse members of the Bar favor traditional court trials, they also lend a receptive ear to the considered judgment, and frequently even to the whims, of responsible clients.

As a result, lawyers and judges at the sessions, though all were devoted to our judicial process, were found giving attention, recognition and some aid and comfort to modern arbitration techniques.[1]

Most of us have considered arbitration to be a new device for the settlement of disputes, a gimmick out of this twentieth century, the mad age of hot rods and cold wars.

However, some legal historians like William Seagle suggest that arbitration actually may have been the origin of courts. The theory is that disputants first voluntarily submitted their quarrels to arbitration, and when this procedure had become sufficiently regular were compelled to do so; that at this point the court, which thus developed out of arbitration, came into existence.[2]

He points out that arbitration existed in very simple and primitive societies, by a chief, a go-between, elders, relatives, friends or bystanders. Among the ancient Greeks, in civil suits the dispute was first required to be submitted to arbitration, although this was only preliminary to the assumption of jurisdiction by the courts. The biblical Hebrew judge was enjoined to "attempt to compromise before proceeding to judgment", and so was the Babylonian judge before him.

Frances Kellor, one of the real leaders in the arbitration field in America, traces it back to the trade guilds and trade fairs in the pre-industrial-revolution period in England. The earliest American origins seem to be with the Dutch in seventeenth century New Amsterdam.

Common-Law Courts Were Reluctant To Enforce Arbitration Agreements

At early common law a bargain to arbitrate either an existing or a possible future dispute was not illegal, but could not be specifically enforced, and only nominal damages were recoverable for its breach. Nor was any bargain to arbitrate a bar to an action on the original claim.[3]

The reluctance of courts to enforce arbitration contracts is said to

1. Substantial portions of this article were given in an address to the U.C.L.A. Conference on November 14, 1952.
2. William Seagle, *The History of Law*, page 60 ff.
3. *Restatement of the Law of Contracts*, Volume 2, page 1055.

date back to dictum attributed to Lord Coke in 1609.[4] The reasons given were both that an arbitration agreement tends to oust the courts of jurisdiction and that such an agreement is in its very nature unenforceable by a court of equity because it calls for personal service and for a series of acts. Though frequently criticized, the Coke dictum was generally respected in England until a statute providing for specific performance of arbitration agreements was enacted in 1889.

In the United States, the English cases were followed until the New York Act of 1920. This act has served as a pattern for the commercial arbitration statutes of New Jersey (1923), Massachusetts (1925), Hawaii (1925), Oregon (1925), Pennsylvania (1927) and California in 1927.

The pioneering New York State Law of 1920 was held constitutional in 1921.[5] The Federal Arbitration Act became effective in 1926.

It is difficult to isolate the rationale behind the early reluctance of courts to compel adherence to arbitration agreements in the absence of statutory authority. Some theorized that arbitrators were agents, and that their authority could be revoked at will. Others maintained that arbitration was contrary to public policy, since its practice tended to oust the legally constituted courts of their jurisdiction.

This latter contention, which sounds suspiciously like that of the old time rural justice of the peace who countenanced a speed trap in his community because his salary was a percentage of the fines assessed, was discussed quite frankly in a 1923 case:[6]

> It was early settled in the jurisprudence of this state, in conformity with that of practically all the states, that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction and to set up private tribunals. . . . Judges and commentators have ascribed the origin of the rule to the jealousy of courts in the matter of their power and jurisdiction and have been somewhat inclined to criticize it on that ground. Another and better ground assigned for it is that citizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights. Whatever may be the true origin of the rule, it is very generally established.

Despite the lack of encouragement of arbitration in common law, a survey made in 1927 revealed that over thirty substantial trade associations regularly practiced arbitration as part of their functions in furthering the interests of the members and the trade.[7] "The survey indicated that business opinion and practice solidly favored the settlement of commercial disputes by arbitration and in no case did any businessman or organization voice an objection to its use as an integral element in the business process. In the production, sale and distribution of staples and raw products, in the building trade, motion picture industry, real estate and many other branches of industry and business, arbitration has come to be recognized as an important element in the contractual relation."

During the 1920's, while legislative recognition of arbitration was being debated, numerous fine academic discussions were written. Many of the conflicting viewpoints were difficult to gainsay.

Most of the objections by legal traditionalists to statutory sanctions for arbitration were expressed rather effectively by the late Philip G. Phillips, the title of his article telling his story: "The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding".[8]

If there must be resort to courts for the ultimate enforcement of arbitration awards, Phillips argued, we have the paradox of "helping an allegedly friendly proceeding by unfriendly court enforcement".

The nature of this seemingly irreconcilable conflict is further elaborated:

> As it is now, any defendant can find a technical defense to an order compelling an arbitration and any arbitration clause can be dragged about in the courts and as much delay obtained as there is in normal law suits. True arbitration is speedy, but the enforcement of arbitration under the Draft Act is not speedy. True arbitration is private, but by specifically enforcing the arbitration agreement, and spreading the facts on the court record, the enforcement under the Draft Act is not maintaining the privacy of the proceeding. Arbitration is cheap, but the expense involved in enforcing arbitration agreements under the statutory process, robs it of its cheapness. Arbitration is friendly, but not when a court compels it. Arbitration is convenient, but there is no convenience about it when it is enforced under the Draft State Act. If the parties go through with an arbitration without being compelled to do so by a court order, it is an untold boon to the settlement of business disputes, but with a court order, it is an entirely different type of proceeding . . . [it] builds up an unbusinesslike system of law, results in technicalities and uncertainties, and does not leave the party having the arbitration clause in his contract at all sure of his remedies.

Interestingly enough, the case for arbitration has been argued by an eminent jurist, Judge Jerome Frank:[9]

> There is a category of disputes for which the courts seem poorly designed: When two businessmen dispute about a breach of a contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they may want is a speedy, sensible readjustment of their relations, so that they can resume or maintain their usual mutual business transactions. Because of the difficulties of precise ascertainment by a court of the actual past facts out of which their dispute arose, it may well be that the best mode of settling it is not a court decision in a lawsuit but arbitration

4. 17 *Calif. L. Rev.*, 643.
5. *Berkovitz v. Arbib*, 230 N.Y. 261, 130 N.E. 288.
6. *Blodgett v. Bebe Co.*, 190 Cal. 665, 667; 214 Pac. 38, 26 A.L.R. 1070.
To the same effect was *Holmes v. Richet*, 56 Cal. 307, in which the court said, "It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such an agreement."
7. 15 *Calif. L. Rev.* 289.
8. 46 *Harv. L. Rev.* 1258.
9. Jerome Frank, *Courts on Trial*, page 376 *ff.*

in which the disputants agree to abide by the decision of the arbitrators.

Since, generally speaking, arbitrators are not bound to apply legal rules, the fact that, increasingly, businessmen resort to arbitration throws some doubt on the conventional notion that precise legal rules are primarily needed in the realm of business, that they supply a certainty and stability which men of business must have, that "the commercial world" demands such rules "because no one . . . engages in complex commercial undertakings trusting to" decisions resting on uncertain exercise of "discretion". Paradoxically, arbitration, with its freedom to disregard the legal rules, seems to function best in dealings with business disputes and not with those disputes which arise from angry personal feelings—where, on the whole, legal certainty has been said to be as of far less importance. One suggested explanation of this paradox is that businessmen who arbitrate have less interest in the legal rules than in the customs of their trade, which they feel will receive more attention from arbitrators acquainted with those trade customs than from the courts. When businessmen choose arbitration, in part, they do so because court trials often involve more delay and expense; because of the exclusionary rules employed by courts which often shut out important evidence in trials; because juries are too much swayed by prejudice; and because, in many arbitrations, the arbitrators are men well acquainted with the usages of the particular trade or business of the disputants.

During the 1920's, proponents of arbitration prevailed, and most states adopted uniform statutes recognizing the procedure. Nevertheless, it is still possible to have common-law arbitration as well in every state except Washington.[10]

Arbitration Award May Be Entered as Judgment Under Statute

The basic differences between common-law and statutory arbitration are those involving enforceability and revocation of agreements to arbitrate, and the entry of the award as a court judgment. For example, the court will not specifically enforce a common-law arbitration agreement, whether it pertains to existing or to future disputes. And either party to a common-law submission may revoke it before an award is made. The statutes, on the other hand, generally provide expressly that agreements to arbitrate existing disputes or future disputes arising out of existing contracts are enforceable and irrevocable. Again, at common law an award is not entered as a judgment and the ordinary mode of enforcing it is by an action.[11] But under a statutory proceeding an award may be entered as a judgment.

There are a number of other significant distinctions. Under the common law, an agreement to arbitrate may be oral,[12] whereas the statutes apply only to written agreements.[13] At common law a party may bring an action on his dispute despite his refusal to arbitrate. But under the code a court will stay such an action until arbitration has been had in accordance with the terms of the agreement. And if no arbitrator is selected, at common law, the agreement becomes a nullity, whereas under statutory procedure the court is authorized to appoint an arbitrator. The statutes empower an arbitrator to issue depositions and subpoena witnesses, and require that documents be produced at a hearing, but there is no such procedure at common law.

Also, the statutes give the right to have an award vacated for gross error, and to have it modified or corrected for miscalculation or imperfection, by a motion made in the proceeding, which remedies are not available against a common law award.[14]

Although many differences exist, the two methods have an important requirement in common: there must be a substantial compliance at common law with the terms of the agreement of submission[15] and under statutory procedure with the terms of the statute.[16] However, it is possible for a proceeding which fails as a statutory arbitration to be given effect as a common-law arbitration, where it is clearly indicated to be the intention of the parties.[17]

It is significant that many legal references have kind words to say about arbitration generally. In 5 *Cal. Jur.* (2d) page 77, we find this comment:

> There are many reasons why arbitration is preferable to the ordinary course of judicial proceedings. It tends to conserve business relations, provides greater opportunity for beneficial results to all parties, is a more flexible procedure, and avoids unwelcome publicity. On the other hand, a suit often causes ill will and a discontinuance of future trading, is more of a gamble and usually allows recovery only to one party, is governed by more rigid rules of procedure, and naturally attracts undesirable publicity. One of the most important advantages of arbitration is that usually the determination is made by specialists in the trade, while those who make decisions in court do not always have such expert knowledge.

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10. 5 Cal. Juris. (2d), 78. The Washington State situation is discussed at considerable length by Dean Sturges of the Yale Law School in 25 Wash. L. Rev. 16.
11. *Gunter v. Sanchez*, 1 Cal. 45.
12. *Dugan v. Phillips*, 77 Cal. App. 268; 246 Pac. 566.
13. *Cockrill v. Murphis*, 68 Cal. App. 2d 184; 156 P. 2d 265.
14. *Dore v. Southern Pacific*, 163 Cal. 182; 124 Pac. 817.
15. *Christenson v. Cudahy Packing Co.*, 198 Cal. 685; 247 Pac. 207.
16. *Ryan v. Dougherty*, 30 Cal. 218.
17. *Kreiss v. Hotaling*, 96 Cal. 617; 31 Pac. 740; see discussion in 5 Cal. Juris. 2d pages 73-75.

Since the last sentence may be considered a libelous reflection upon the infallibility of judges, I should not have included it, except of course that I interpret it to have reference to juries only. Lawyers who try jury cases know that if upon *voir dire* examination a prospective juror is found to have any knowledge whatsoever upon the general subject involved in the lawsuit, he is peremptorily challenged. In fact, if his I.Q. is over 100, he is sometimes suspect.

Expertise of Arbitrator Saves Time

In arbitration, conversely, any knowledge of the field of controversy is considered a distinct asset to the arbitrator. Most businessmen prefer to have their problems determined by an arbitrator who does not require tedious briefing in the fundamentals, terminology, practices and customs of their particular business. Therein lies one of the major time-saving elements.

Typical of arbitration agreements of that type are those used by the United Farmers' Association of California, a produce marketing group;[18] the Canners League of California, with a "blind" arbitration method by which the controversy is submitted to arbitrators without identification of the parties;[19] the Foreign Commerce Association[20] and the motion picture industry.[21]

We cannot blind ourselves, however, to one inherent danger in that pre-existing knowledge of the businessman arbitrator. Along with his store of data regarding the nature of the business, there is always a serious possibility that he may also have acquired beliefs concerning the general reputation, truthfulness, financial responsibility, or relationships of one or more of the parties. While Rule 18, Commercial Arbitration Rules of the American Arbitration Association, calls for the disclosure by the arbitrator of "any circumstances likely to create a presumption of bias", it takes remarkable insight to recognize a prejudicial state of mind.

Our courts provide the procedure by which a biased judge may be disqualified. In arbitration, the parties having selected the arbitrator, are apparently satisfied with his impartiality; but in a situation in which the arbitrator is chosen for them, there is no technique for removing the biased arbitrator, except through court action. And as has often been said, if the parties are to go to court eventually, then there are no advantages to arbitration.

There are no specific qualifications for an arbitrator. Thus in three-man arbitrations, frequently each side chooses one whom they expect to be an advocate, and those two select the third, upon whom rests the actual responsibility. Recently, however, some trial courts have upon motion disqualified the "advocate" arbitrator if it could be shown that he was associated with the contestant. It has been held that an arbitrator should bear at least the objectivity required by law of a trial juror.

When the first arbitration legislation was passed there was widespread suspicion among lawyers that it would be a major threat to their indispensability. Many businessmen looked at the legal profession as parasitic, particularly so long as they could refer their problems to an arbitrator without benefit of counsel.

This unrealistic approach reckoned without creeping legalism, however. Since most contracts calling for arbitration were prepared by lawyers, they had a continuing interest in any dispute arising under the agreements. Thus their participation in arbitral matters became more common.

For the year ending December 31, 1926, the American Arbitration Association reported only 36 per cent of the parties to commercial arbitration at the hearing stage were represented by counsel. Twelve years later that figure rose to 70 per cent. By 1946, it was 82 per cent. In labor arbitration, lawyer participation is over 91 per cent.

Actually the organized Bar never was formally opposed to arbitration. One of the Bar's constructive critics, Professor Willard Hurst, of the University of Wisconsin Law School, wrote that the most "notable exception to the bar's general unconcern toward the costs of legal service was the support which the American Bar Association gave to legislation effectively implementing commercial arbitration".[22]

Arbitration Does Not Menace Lawyer's Security

The lawyer who has given arbitration a fair opportunity finds no menace to his professional security. On the contrary, he may experience in organized tribunals, standard rules of procedure, favorable arbitration laws, available qualified arbitrators and comfortable hearing-rooms, opportunity for the practice of arbitration which ultimately may have as large a role in his total program as have court trials.

Many lawyers have experienced not only advantage to their clients in commercial arbitration because of its dispatch, but utility to themselves. This is found not only in the speed with which arbitration is handled and determined, but the convenience in setting hearings when and where he wants them (subject, of course, to the equal convenience of his adversary).

Lawyers who have had prior misgivings over fees in arbitration matters for the most part have been disabused of those fears. While on a strictly hourly billing, court trials will produce more revenue for the law office, as a practical matter most lawyers charge clients on a basis of hours plus results achieved. A client who has been saved both the inconvenience of a long delay before trial, and a tiresome trial itself, and who has experienced a less protracted and expedient arbitration proceeding, may well consider the results achieved sufficient to justify a thoroughly adequate counsel fee.

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18. *United Farmers Ass'n. v. Klein*, 41 Cal. App. 2d 766; 107 P. 2d 631.
19. 15 *Calif. L. Rev.*, 289.
20. *Christenson v. Cudahy*, 198 Cal. 685; 247 Pac. 207.
21. 17 *Calif. L. Rev.* 643.
22. Hurst, *Growth of American Law*, page 325.

The Judicial Salary Crisis:
An Increase Is Urgently Needed

by Morris B. Mitchell • Chairman of the Committee on Judicial Selection, Tenure and Compensation

■ It is self-evident that the quality of justice dealt out by our courts depends ultimately upon the character and ability of the men who serve as judges. This article calls attention to the fact that the low salaries paid to our federal judges (and to most state judges) are endangering the kind of justice that our courts dispense — able judges are resigning because they cannot afford to live on the judicial stipend; the best qualified lawyers sometimes refuse to accept appointment to the Bench. Several bills have been or will be introduced in the 83d Congress to remedy the situation; Mr. Mitchell calls for support from the Bar to secure their passage.

■ Bills providing for increases in judicial salaries will be introduced in the 83d United States Congress and in many of the forty-four state legislatures which convened early in 1953. It is important that American lawyers understand the urgent need for such salary increases so that they can and will give these bills sufficient support to insure their passage.

In order to avoid generalities, this article will deal specifically with the need for raising the salaries of 223 judges of the United States District Courts—courts with which most American lawyers are familiar. If the need for raising these salaries can be established, this should also show the need for raising the salaries of the sixty-five judges of the United States Courts of Appeals, the nine judges of the United States Supreme Court, the nineteen judges of the other special federal courts, the sixteen judges of the Tax Court of the United States, and the judges of most state courts.

The current work of the federal district courts and the inadequacy of present salaries paid to the judges of these courts were fully discussed by many bar association representatives and judges who appeared before a hearing of the Committee on the Judiciary of the United States House of Representatives held on July 27, 1949, in connection with the consideration of two pending bills increasing the salaries of all federal judges. Much of the material of this article is taken from statements made at this hearing.

Several of the witnesses at this hearing described the current nature of the work of the federal district courts and the greatly increased duties and responsibilities which the judges of these courts have had to assume in recent years. They stressed the fact that the varied and extensive jurisdiction of the federal courts requires a federal judge to have a working knowledge of constitutional law, maritime law, engineering, finance and business, labor practices, taxation and many other specialized fields of law. Many of his decisions touch the activities of numerous individuals and business enterprises, and even the lives and liberties of many American citizens. The decisions of these federal district courts on these important matters must in general be right if people are to keep their confidence in the courts and in the Government which these courts represent. As one witness at the House Judiciary Committee hearing stated it, "There is no room for fielding errors." And if these important decisions are to be right, they must be made by judges of high character and first-rate ability.

The extent to which the work of every federal district court judge has increased in the past eleven years is shown by the annual report of the Director of the Administrative Office of the United States Courts, which states that from the year 1941 to the year 1952, the number of civil cases filed in the federal district courts increased 56 per cent, whereas the number of federal district judges increased only 13 per cent during the same period.

Concurrently with the great increase in the work done and the responsibility assumed by these federal district judges has come a drastic decrease in their actual compensation. This has been caused by (1) federal and state income taxes and (2) shrinkage of the purchasing power of their salary.

Federal Income Tax Has Diminished Judicial Salaries

A change in the federal income tax

status of federal judges has greatly diminished their actual salaries. The cases of *Evans* v. *Gore*, 253 U. S. 245 (decided in 1920), and *Miles* v. *Graham*, 268 U. S. 501 (decided in 1925), held that federal judicial salaries were constitutionally not subject to federal income taxes. However, in 1939, these cases were reversed by the case of *O'Malley* v. *Woodrough*, 307 U. S. 277, which held that federal judicial salaries were subject to federal income taxes. In the same year (1939), Congress passed a law (Public Salary Act, 53 Stat. 574), which gave the consent of the Federal Government to the taxing of salaries of federal employees and officers (including judges) by state and local governments.[1]

As a result of the O'Malley decision, a federal district judge (who, prior to 1939, had received his salary in full without any tax deduction) paid a federal income tax of $3304.00 in 1952.[2]

During the same year, and under similar circumstances, a Judge of the United States Court of Appeals paid a federal income tax of $4154.00 on his $17,500 salary, and a Justice of the Supreme Court of the United States paid a federal income tax of $7088 on his $25,000 salary. Most of the federal district and circuit judges also paid state income taxes in addition to the federal income tax.

Purchasing Power of Dollar Has Decreased since 1939

In 1939, the year when federal judicial salaries first became taxable, the Consumers' Price Index, as compiled by the United States Bureau of Labor Statistics, stood at 99.6. As of November 15, 1952, the index stood at 191.6 —representing an increase of 92 per cent in the cost of living since 1939. This means that, in 1952, the $11,696.00 which remained after federal district judges had paid their federal income taxes, had an actual purchasing power equal to approximately $6080.00 in 1939. The $13,346.00 which remained after circuit judges had paid their 1952 federal income tax was the equivalent in purchasing power of approximately $6940.00 in 1939; and the $17,912.00 which remained after Justices of the Supreme Court of the United States had paid their 1952 income taxes was the equivalent in purchasing power of approximately $9300.00 in 1939. Because of state income taxes, the salary which remained after most federal district and circuit judges had paid all their income taxes was actually less than these figures.

Resulting Hardships Keep Able Men Off Bench

With this double-barreled attack on judicial income, which began in 1939, it is not surprising that most judges are currently having difficulty in living on their present incomes and that many of them have encountered actual financial hardship. The hearings before the House Judiciary Committee in 1949 brought to light many of these hardship cases—and it should be noted that both federal income taxes and the cost of living have sharply increased since this 1949 hearing. Witness after witness at this hearing stated that current federal judicial salaries require federal judges to live on a very modest scale and that after paying necessary living expenses nothing remains for emergencies or for savings. Many instances were cited where illness or other unusual expenses had forced judges to use up savings which they had accumulated prior to going on the Bench, and in some cases these emergencies had caused them to go into debt. It was stated that most federal judges worry about the future of their families in the event of the judge's death, inasmuch as Congress has not provided annuities for surviving dependents of federal judges (as it has done for many other federal officials and employees) and inasmuch as present federal judicial salaries do not permit a savings or insurance program adequate to protect dependents of a judge in the event of his death.

These witnesses also pointed out the harmful effect on federal judicial administration of these inadequate salaries. There was general agreement that the incumbent federal judges were on the whole doing an outstanding job in carrying on their work, despite individual financial hardship. But it was also pointed out that judges who are worried about the sharp decline of their actual income and the financial future and security of their families are not in a frame of mind to do their best work on the Bench.

But the most important effect on the federal judiciary of these inadequate judicial salaries is the difficulty of getting good men to accept appointment at present salaries and the inevitable decline of the calibre of the federal judiciary unless salaries are substantially increased. Several witnesses stated that if federal judicial salaries are not placed on a sufficiently high level to make it possible for successful lawyers to accept appointment without hardship to themselves and their families the result will inevitably be that judges must, in the main, be selected from either (1) lawyers who have acquired financial independence, or (2) lawyers who have been so unsuccessful in practice that their present earnings will bear favorable comparison with present federal judicial salaries.

The witnesses did not believe that either alternative would be desirable —even though they recognized that there are some lawyers who are not fitted by temperament for the active practice of law, but who nevertheless would make good judges. They felt, however, that generally success in practice is the result of professional competency and character, and that these qualities generally assure dependability and competency in judicial office; and that federal judicial salaries should be such as to make it

1. Salaries of state court judges were similarly diminished in 1939 by a change in their income tax status. The early case of *Collector* v. *Day*, 11 Wall. 113 (1871), held that Congress could not, under the Constitution, impose a tax upon the salary of a state judge. In 1939, the case of *Graves* v. *N. Y.*, 306 U. S. 466, expressly overruled *Collector* v. *Day*, and held that all employees and officers of federal and state governments (including judges) were subject to both state and federal income taxes. See also *Gunn* v. *Dallman*, 171 F. 2d 36. The American Bar Association Committee on Judicial Selection, Tenure and Compensation has prepared a memorandum on the need for state judicial salary increases, which has been sent to all state bar association presidents.

2. These figures are computed under the Revenue Act of 1951, and on the assumption that (1) the judicial salary is the only income of the judge, (2) the judge is married, (3) his wife has no income, (4) standard deduction is taken, and (5) the tax is computed by use of the split-income method.

possible to get successful lawyers to accept judicial appointment. This is particularly true now, when the constantly expanding duties of federal judges places demands upon that Bench which only the ablest lawyers can hope to meet.

The American Bar Association's Committee on Judicial Selection, Tenure and Compensation (of which the writer is a member) has learned of many situations that show the difficulty of getting successful lawyers to accept judicial appointment. One of the principal duties of this Committee has been to study the operation of present methods of selecting judges and to co-operate with state bar associations in improving such methods. The Committee has urged adoption of the American Bar Association plan for nonpolitical selection of judges—which has been adopted and is now in effect in Missouri, and which the American Bar Association has recommended for consideration by all state bar associations. However, reports received from all parts of the country show that, currently, the greatest obstacle in the path in getting good judges on the Bench and maintaining the standards of the American judiciary is the low judicial salaries paid in most states and by the Federal Government. In Missouri, for instance, many of the lawyers selected by the Nominating Commission have refused to permit their names to be submitted for possible judicial appointment. In one state, after a bar preference poll had selected three men to recommend for a judicial vacancy, all three candidates refused to permit their names to be submitted to the Governor because they could not live on a judge's salary. In another state, a member of the Governor's staff reports that, in filling judicial vacancies, the Governor has been unable to get first-rate lawyers to accept appointment, and has been forced to appoint lawyers far down the list in ability. In some Eastern cities, where local bar associations have wanted to recommend lawyers for appointment to vacancies on the Federal Bench, many lawyers of first rate ability have refused to let their names be considered—some of them stating that, even though they are willing to make financial sacrifices in order to accept judicial appointment, they could not possibly keep up their insurance programs on current federal judicial salaries.

The Problem Is Immediate

At the present time, the difficulty in getting the ablest lawyers to accept appointment to the Federal Bench is not an academic question. The Judicial Conference of the United States (composed of the Chief Justice of the United States and the Chief Judges of the United States Courts of Appeals) recommended, in its 1952 report, the creation of twenty-one federal district judgeships and three additional circuit judgeships. A bill to create most of these judgeships was passed by the Senate in the 82d Congress, but did not get to a vote in the House. In all probability, a similar bill will be passed in the current session of Congress. There are also a substantial number of federal judges who are eligible for retirement and who will probably retire within the next few years. Consequently, the new President will have to make many new federal judicial appointments. There will undoubtedly be many "willing Barkises" for these judicial appointments, despite the low salaries—but if the President is to make these appointments from the abler members of the Bar, the salaries must be raised so that such men can accept these appointments without hardship to themselves and their families.

Reduced Federal Budget Should Not Prevent Overdue Raises

To secure adequate increases of federal judicial salaries in the face of the present determination of Congress to reduce federal expenditures and federal taxes will be a difficult, but not an impossible, task. There are several sound reasons that differentiate federal judicial salary increases from other proposals for increased federal expenditures. In the first place, such increases are long overdue. In 1949, the Commission on Organization of the Executive Branch of the Government (generally known as the "Hoover Commission") went beyond its assigned jurisdiction in order to point out the necessity for increasing federal judicial salaries. In its Recommendation Number 11, the Commission, after recommending a raise in the salaries of certain career employees in the executive branch of the Government, stated: "At the same time it [Congress] should increase legislative, judicial and executive salaries at the level of assistant secretary, or its equivalent, and above. The Commission has considered confining these recommendations to the executive branch alone. Although aware that it is exceeding its charter, the Commission has concluded that to recommend any increase in salary without taking the whole picture into consideration would confuse rather than clarify an action that is essential in strengthening our whole government structure." In one of the "Task Force Reports" pre-

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pared for and accompanying the Commission's report, the Commission stated that it is unrealistic to adjust the salaries of civil service executives without a corresponding increase in the salaries of elective and appointive officials. A table which accompanied this report to illustrate the proposed increases included proposed increases in the salaries of the President and Vice President of the United States, the Speaker of the House, the heads of executive departments and Justices of the United States Supreme Court —and the report recommended raises in the justices' annual salaries from $25,000 to $35,000. Congress has already increased the salaries of all the officials mentioned in this report except the congressional and judicial salaries. It seems probable that congressional salaries will be raised during the current session of Congress; whether or not this is done, certainly federal judges should be given their long overdue salary increases in accordance with the recommendation of the Hoover Commission.

There should be no objection to granting federal judicial salary increases, despite the necessity of reducing total federal expenditures, because of the small cost involved in such a judicial salary increase as compared with its great importance. It has been suggested that a $10,000 increase be provided for all federal judges, and legislation to that effect is now under consideration. Because of federal income taxes, a $10,000 increase in salary would result in a net increase in "take home" pay of a much smaller amount. In the case of district judges, the net increase would be $6216, for circuit judges, $5938, and for Supreme Court Justices, $5008.

It is estimated that this increase of $10,000 per year for all federal judges, including the members of the Tax Court, would entail an additional gross expenditure of $3,660,000, of which approximately $1,420,000 would be returned to the United States Treasury in the form of taxes. The net proposed budget of the federal courts, including salaries, for the fiscal year 1954 is $26,370,075.[3] This is about one-thirtieth of one per cent of the total federal budget of $78,600,000,000, as submitted to the Congress by former President Truman and one twelfth of one per cent of the total 1954 budget, exclusive of expenditures for military services.

General Recognition of Need for Action

But the last and most compelling reason for granting these federal judicial salary increases, regardless of necessary federal budget reductions, is the long and widely recognized need for such increases, in order to preserve the standing and capacity of this important co-ordinate branch of the Federal Government. The recommendation of the Hoover Commission for federal judicial salary raises has been referred to above. The House of Delegates of the American Bar Association in 1949,[4] and again in 1951,[5] recommended such increases. The Conference of Bar Association Presidents, at the recent meeting in San Francisco, authorized the appointment of a committee to work for federal judicial salary increases.

The following quotations are typical of the editorial comment on this proposal:

New York Times—

> It seems the time to view realistically the inequity of paying federal judges $15,000 annually, whether the post is in New York or in rural areas. . . . It can be argued that it is a lifetime position and a great honor to be selected for one of the country's most important courts. But today, with the high cost of living, a judge on the federal bench is entitled to better compensation. One should note that the New York State Supreme Court justices receive $28,000 a year.

New York Daily Mirror (commenting on an address by Federal District Judge John C. Knox, before the Federal Bar Association of New York, New Jersey and Connecticut, in which he disclosed that in his thirty-five years of service on the Federal Bench, he had saved only $6200.00, and that, of his $15,000 annual salary, $6000 goes for federal and state taxes)—

> We believe this kind of thing can't go on without damage to the prestige of the federal courts. The abler lawyers will not be attracted, and federal judgeships will become a refuge only for hacks who can't make a go of it in private practice and want to get in out of the rain. . . . We hope it is sufficiently embarrassing to Congress . . . to bring about a remedy.

There can be no doubt that it is in the public interest to have federal and state judges paid sufficient salaries to meet their reasonable personal and family financial demands and to have these salaries sufficiently high to attract the abler members of the Bar and to maintain the high judicial standards which have always been demanded of our judges. These judges are not adequately compensated at the present time, due to the impact of income taxes and the shrinking purchasing power of the dollar in recent years.

If our judiciary is to continue to maintain these high standards and if our individual judges and their families are not to suffer financial hardships, then the lawyers of America must assume the duty of letting Congress and the state legislatures know of the urgent need for adequate judicial salary increases.

This is a task which only American lawyers can perform. The judges themselves cannot do it because of their judicial office. But American lawyers—from whose ranks these judges were chosen and who, in many instances, participated in choosing the present incumbent judges for elevation to the Bench—can very properly present the case for judicial salary increases to Congress and to the state legislatures. If the Bar will wholeheartedly undertake this task, these judicial salaries will be raised to an adequate level.

It is submitted that this is a duty which American lawyers owe to their profession and to their country.

3. From figures furnished by Administrative Office of the United States Courts; see also "Federal Judges Compensation", by A. Aldrich Mooney, 27 *N. Y. University Law Rev.*, page 465; "The Administrative Affairs of the United States Courts", by Chief Judge Harold M. Stephens, (U.S.C.A., District of Columbia Circuit), 38 *A.B.A.J.* 555-622.
4. 74 *A.B.A. Rep.* 383 (1949).
5. 76 *A.B.A. Rep.* 125 (1951).

The Schuman Plan:

An Appraisal

by William K. Coblentz • of the California Bar

■ The Schuman Plan has been praised as a great contribution to the cause of world peace, and bitterly criticized as idealistic and dangerous. While the United States is not directly involved, the success or failure of M. Schuman's proposal may have much to do with the future of this country for many years to come. Mr. Coblentz's article describes the plan in detail and should be of interest to every lawyer.

■ On April 18, 1951, representatives of six European governments, France, Italy, Belgium, the Netherlands, West Germany and Luxembourg, meeting in Paris signed a treaty for the creation of a "European Coal and Steel Community". Popularly known as the Schuman Plan, the treaty is a blueprint for a federal authority to which these six nations would cede most of the governmental powers they now hold over their respective coal and steel industries. The purpose of this Authority would be to form a single market for coal and steel serving more than 160 million people of these countries. Within days of the signing, key officials in Bonn, Brussels, Paris, Rome, Luxembourg and The Hague were busy preparing to submit the treaty to their parliaments for ratification. On June 16, 1952, Italy became the sixth and final nation to ratify this revolutionary project for an economic linking unprecedented in European history and on August 11 the High Authority was established under the presidency of Jean Monnet, chief architect of the Plan.

As long as any European can remember, almost every problem of that continent ultimately has had its origin in the much larger and centuries-old problem of European disunity. As the second half of the twentieth century began, it was clear that Europe could not for much longer defer coming to grips with this problem. Europe's only hope for survival lay in the development of mass production and assembly chain methods and these urgently called for the formation of a single economic market for the whole of Europe. Since the end of World War II, there have existed hard facts raising questions which cry out for decision. The German people, for instance, are a fact. What part they should play in the economic life of Western Europe is a question that has to be answered. The Ruhr Valley with its concentration of coal mines, steel mills and skilled workers is a fact. Postwar Europe is more dependent than ever on the products of the Ruhr. Great Britain cannot supply coal as before for continental needs. The mines of Upper Silesia, now part of a Sovietized Poland, are now serving the needs of the Soviet Union. Thus in some way full utilization of these resources for the common good of the European community, including Germany, has to be achieved.

The European Movement, an organization of private citizens and statesmen in Europe working for union, formulated a plan for the pooling of steel and coal resources of Europe to be administered by a supranational High Authority responsible to a European parliament at an Economic Congress in London in March of 1949. This was presented to Robert Schuman, the French Foreign Minister, and in May, 1950, in the name of the French Government, M. Schuman announced his plan for the pooling of coal and steel resources throughout Europe. Thus France became the first member nation of the Council of Europe, the over-all parliamentary body of Europe, to make this objective a basis of its national policy and it constituted the first practical steps toward the ultimate realization of a European customs union.

Plan Would Ease Franco-German Enmity

The concrete measure proposed by the French was one which would make the age-old enmity between France and Germany academic. The entire French-German production of coal and steel would be placed under a joint High Authority within an organization open to the participation of other European countries. If this were done, said the French pro-

posal of May, 1950, "any war between France and Germany becomes not only unthinkable, but in actual fact impossible". On June 6, 1950, a conference of experts of the six countries who had agreed to participate, met in Paris to examine the French Government's proposal. On March 19, 1951, after nearly ten months of negotiations which, at times, were strained almost to the breaking point, the draft treaty embodying the main provisions and fundamental principles of the plan was initialed by the representatives of the countries involved. Some gaps still had to be filled in by their governments and a few weeks later the foreign ministers themselves met in Paris to fill out these details and sign the treaty on April 18. Although the United Kingdom found the French proposal unacceptable and did not join the talks, and although a system of constitutional checks and balances especially through the addition of the Council of Ministers has modified the original intentions, the essential framework of the bold concept remains intact in the treaty.

The main lines of the European Coal and Steel Community as they appear in the treaty are those of an organization designed to assume real responsibilities with adequate authority. A federal type of organization it will, within the framework of the treaty, be self-sustaining and independent. As such it will have an executive branch, a legislature to which the executive is responsible and a judiciary to insure the rule of law between the ruler and the ruled. These various governmental functions will be exercised through four institutions, the High Authority, advised by a Consultative Committee representing producers, labor and consumer, a Common Assembly, a Council of Ministers and a Court of Justice. The High Authority or the executive is to be composed of nine persons qualified by their general business experience but having no connection with the coal and steel industries. Their powers will include the right to tax the production of enterprises, to issue directives binding on both the individual enterprises and the state, to fine enterprises violating its orders, to borrow and to lend, and to have unhindered access to all records and facts needed to administer the provisions of the treaty.

When the time for appointment of the Ministers of the High Authority arises, the appointees, not more than two of whom may be of the same nationality, will be chosen by common agreement between the various governments. They will have no obligations to any particular member state but will be responsible to the Community as a whole. In the first instance eight appointments will be made by the governments and the ninth person will be elected by the remaining eight. After six years in office the High Authority mandate will be renewed, eight of the members being nominated by the majority of five sixths of the governments, the ninth being elected by the other members. Every two years after that, the terms of one third of the members will end. It is also provided that each government will have the right of veto against any candidate proposed by the others provided that this veto is not exercised against more than two persons.

The Authority has large financial resources which fall into three categories. The first, an equalization fund raised by a tax of 1.5 per cent on every ton of coal and steel. The second, a compensation fund raised by a tax of 1 per cent on total production, to help firms threatened with closing to re-equip and reorganize themselves and to back the High Authority's credit to firms which need it and whose purposes are approved. The third, an investment fund, to be raised by loans. Since the investment cannot under the treaty's clauses be made in the shape of government subsidies to national industries, and, as the Authority has wide powers of information enabling it to examine accounts and agreements between producers or even consumers and union, the Authority's influence to *persuade* will be very great. But it cannot give orders (except within strictly defined limits) or direct the industries under its control like the board of a nationalized industry. Its powers are only designed to ensure competition in normal times and public direction of the economy and not a cartel direction in times of crisis.

The Treaty Provides for Checks and Balances

It is clear, however, that the High Authority will not be able to rule by edict. The treaty provides for checks and balances in the Community itself. Thus the seventy-eight man Common Assembly, elected by universal suffrage either directly by the people or indirectly by the parliaments of the participating countries and made up of twenty-four representatives of the Benelux countries and eighteen each from France, Western Germany and Italy, will review the Authority's work annually and will have the right to demand replies to all questions it chooses to ask the High Authority. By a two-thirds vote it will be able to censure the Authority and compel its members to resign. The Assembly will meet in general sessions once a year from the second Tuesday in May to the end of June to review the acts and examine the policy of the Authority. Extraordinary sessions may be called at the request of the majority of members. The Assembly's meeting amounts in some sense to a shareholders' meeting with powers to examine the Authority's annual report and require its collective resignation and replacement should its vote on that report be unfavorable. In effect, however, the Assembly will be much more important, for it will ensure that the parliaments, and through them the people of the European Community, will have the final word in the control over the Authority and thus preserve the democratic character of this powerful supranational institution.

In addition, the Council of Ministers made up of six ministers drawn from the governments of each country participating in the Community will serve as a direct link between

the High Authority and the member states. The Council, for instance, has a direct role whenever a question of market control is concerned. It may even take the initiative in the event that the High Authority fails to act in cases of short supply requiring allocations or in cases of declining demand requiring production quotas. Similarly, the High Authority must obtain the concurrence of the Council when it grants loans to carry out investment programs or when it seeks to bring new industries into areas affected by coal or steel production shifts. In all situations not expressly provided for in the treaty, decisions or recommendations of the High Authority are to be made subject to the unanimous concurrence of the Council of Ministers. A special provision is to the effect that there will be a proper balance of votes in favor of countries that produce at least 20 per cent of the total value of coal and steel in the Community; *i.e.,* France and Germany. Thus, no decisions or concurrence can be reached either against France or Germany together or against the four other countries together; which means that the Council cannot be dominated by a coalition, either of the two principal states of the Community, or of the others.

A third most important check will be the proposed Court of Justice. It is to be composed of seven judges appointed for six years by agreement among the governments of the member states, with a partial change in membership every three years. The Court's principal function is to render its judgment upon appeals presented by member states against decisions of the High Authority. It acts in much the same way as the courts of the United States who may declare the laws of Congress unconstitutional or nullify the decisions of administrative bodies of the government. Moreover, it gives opinions on all proposals concerning the revision of the treaty and, should the functioning of a common market provoke fundamental and persistent disturbances in the economy of one of the member states, the Court is invested with the special responsibility of judging the merits of the appeal made to it by the government concerned. In case the Court annuls either the decisions taken by the High Authority or the latter's rejection of the appeal made by the government concerned, the High Authority must decide on the measures to be taken in order to put an end to such a situation.

The system of governments of the federal community is completed through the Consultative Committee. This Committee will consist of thirty to fifty representatives drawn in equal numbers from the producer, labor and consumer groups. It will serve as an advisory body to the High Authority which is required to avail itself of the advice of this Committee in all cases where positive recommendations or decisions are contemplated affecting the interests of the represented groups. While it will be the principal adviser to the High Authority, private representatives will not be barred. Thus, in all cases where consultation with the Consultative Committee is required any voluntary association which adequately represents producer, labor and consumer interests may also submit to the High Authority its own observations on the case in question.

The creation of an industrial community of so great a scope implies such over-all changes in relation to the present condition of the markets, to the partitioning which divides them, and to the protective measures which surround the industries in each country, that only gradually will the Community be able to go into full operation. A five-year transition period has been provided for, during which the High Authority will authorize the practice of fixing prices by zone and the maintenance of national compensatory mechanisms. It will be empowered, in particular, to place on the production of coal in countries where average prices are lower than the general average of the community an equalization levy of which the ceiling will be 1.5 per cent of the producers' income during the first year and which will be regularly reduced by 20 per cent each year. The Belgian mines in particular should be improved; the unprofitable part of their production should be replaced by coal from the member states and consumers of Belgian coal would benefit from a reduction in prices. As far as the French coal industry is concerned the decrease in production that may be brought about by the establishment of a common market may not exceed an annual ceiling of one million tons during the period of transition. As for Italy, whose steel industry is undergoing complete reorganization, it will be authorized by the High Authority to apply, during this same period, annually decreasing customs duties on steel products imported from other member states.

Siri

William K. Coblentz was graduated with a B. A. degree from the University of California and in 1947 received his LL.B. from Yale Law School. He has practiced in San Francisco and was an instructor at the Hastings College of Law. Presently he is with the American Committee on United Europe, a group of private citizens that believe that the peace and safety of the United States requires a United Europe.

Proposal Has Evoked a Number of Criticisms

A number of criticisms have been put forward during the course of and subsequent to the negotiations on the creation of a coal and steel

pool. Some of these were concerned with the principle itself, others dealt with the difficulties arising in the plan to be put into practice. The former can only be answered by reiterating the aims and functions of the authority and the principle on which it rests. The latter have been taken into account in an accompanying Convention specifying the arrangements to be made during the transitional period. Criticisms by producers have been and are still being heard, loudest of all in the iron and steel industry. The Authority is accused of paying insufficient attention to the professional points of view and embarking on a policy of general direction of investment which is hardly distinguishable from international planning. It is accused of breaking up cartels and restricting the growth of combines which in the view of many producers are indispensable to the European economy. It is interesting to note that the many steel producers, who were willing to submit to the Schuman Plan in 1951 when an overproduction of steel was feared, see only the plan's drawbacks now that rearmament programs guarantee a profitable outlet for their production. Many producers ask that the powers of the Authority be given to professional associations reserving to the European organization a mere right to control and veto in case of violation of the treaty. Insofar as the Authority is endowed with effective powers at present in the hands of national governments, such a transfer can be only made to a high international authority and not to a group of private interests. Furthermore, the Authority is subject to parliamentary control, but the Assembly would have no power over the professional associations. Free from such control these private groups would be able to bring pressure to bear on the entire economic fabric of Europe. Thus it would seem that the powers should be left in the hands of the Authority which keeps in touch with professional associations both directly and through the Consultative Committee in which they are represented.

Violent protests have been made against the suppression of existing cartels. Surprisingly, one of the most vociferous critics was Kurt Schumacher, leader of the German Socialist Party, who found himself in this case in the employers' camp and whose main attack was directed against the breakup of the German coal syndicate and against Article 59 of the Authority which empowers the High Authority with the approval of the Council of Ministers to make allocations of resources in times of shortage.

Before the war enough damage was done by the systematic exploitation of the European market by the international steel cartel or by the aggressive nationalist uses made of the Ruhr coal monopoly for the necessity of avoiding these changes to be evident. Neither a private organization nor any one state should be allowed to retain the power of controlling the market; to admit this would be to reject altogether any idea of organization on the international plane. The planning powers of the Authority are restricted to the barest minimum necessary to ensure the smooth running of the market. Apart from the powers assigned to it for this purpose, in order to obtain information required for its estimates, the Authority works mainly through the investment fund. Otherwise its actions are confined to recommendations and opinions.

Undertakings which do not follow these recommendations will be left in the same position as they are today. They will be able to do as they please but at their own risk and without being able to claim financial assistance from the Authority. It is only in serious cases of obvious overproduction or at the other extreme of acute shortage that the Authority is entitled to impose quotas or to set up a system of allocation and then only with the approval of the Council of Ministers. In such circumstances joint action is essential to avoid flagrant exploitation of the weaker by the stronger members of the community.

Much criticism has been made against the Authority by those who uphold the principle of national sovereignty. The High Authority is said to be vested with arbitrary powers and is condemned as an attempt to establish the omnipotent rule of a handful of technical experts before whom mere national undertakings will be powerless. But such is not the case. The Authority will, in fact, be responsible to a European Assembly which will achieve on a small scale the objective many are trying to achieve with the Council of Europe. The Assembly is not restricted to an annual meeting. On the contrary it may meet as often as it pleases in extraordinary sessions called by a majority of its members. Further, the numerical proportions between the national delegations to the Assembly are such that it will be impossible for one country alone to dominate or obstruct it, and even for two countries acting together to achieve between them the majority required. No one nation will be able to impose its will on the others in any way whatsoever. The Court of Justice may be called upon to obtain redress in cases where abuse of the Authority's powers affects private interests. The form and working of the Court will be modeled on the French Council of State *(Conseil d'Etat)*, an administrative institution which has, in fact, ensured the protection of private interests and individual liberties for more than a century.

The formation of a European pool will inevitably bring about a considerable increase in the production of coal and steel. It will promote a better division of labor, the growth of specialized undertakings and the development of mass production methods which will in turn reduce production costs and thereby enable prices to be stabilized and lowered and the standard of living of the workers to be raised. But during the transitional period, like every great technical experiment, the formation of the pool may involve the closing down of the fully equipped or marginally inefficient concerns. In those cases severe decisions will have to be made which in some countries will

result in temporary hardship and readjustment difficulties. These difficulties have been widely exaggerated and widely conflicting views have been expressed about them in the general discussion which has taken place all over Western Europe.

Only time will tell how the Community will use its powers when it is formed. However, the dominant principles of the plan are clear. The coal and steel industries of the six countries are ultimately to become a single community and in all practical aspects national boundaries will be erased insofar as these basic industries are concerned. The countries of Western Europe would abandon their efforts to be individually self-sufficient in coal and steel and would allow these industries to develop in a common market embracing all the member states.

One of the aims of the Community is to establish a common market in order to expand production, lower prices and assure the free access of consumers to all the sources of production. Under the plan free competition would be the normal rule of trade and the broad scope of individual opportunity and initiative would remain in the coal and steel enterprises. Another outstanding aim of the plan is to free private enterprises from their own entanglements of restrictive agreements or consolidations among enterprises which are harmful to competition, freeze prices or impede technological advances. Transport arrangements will as a rule be made as though national frontiers cease to exist. Rate discriminations between producer and purchaser according to the origin and description of goods will be forbidden. In other words, the plan provides for the general application of the principle at present operating on a national scale, that of rates slowly diminishing as total distance increases. While the High Authority will have no direct powers to close down high-cost or marginal and permanently inefficient coal mines or steel plants, it is foreseen that competitive forces under the single market will result in some shifts in coal and steel facilities among participating countries. Accordingly the High Authority will have the means to help workers in the readjustment which might follow. Such help as liberal separation pay, retraining courses or payments of resettlement expenses as well as the financing of new industries in affected areas is contemplated. The direct use of wage reductions as a technique of competition is outlawed. The countries commit themselves to eliminate practically all restrictions in the shifting of skilled labor from one country to another within the area.

The Schuman Plan is the far-seeing statesmanship which is needed to build a framework for enduring peace. Certain elements of national sovereignty must be sacrificed. With this statesmanship there is blended the practical realism which faces the facts as they are. The French themselves see the plan as a step toward an eventual European federation. In first announcing the proposal, M. Schuman declared, "This proposal will lay the first real foundation of a European Federation which is essential to the preservation of peace." The same thought was repeated in the declaration by the Ministers of the six signatory nations the day the treaty was signed. There is danger as there has been in all great experiments. But the treaty is, above all, an act of faith in the birth of a United Europe.

The President's Page

(Continued from page 179)

time. The American Bar Center can be the focal point for research programs of this scope and significance.

The long-range objectives of the American Bar Association will never be completed. Rather they exemplify the goals toward which the lawyers of America must forever strive. Justice will never be perfect while it is administered by men. And the task of improving the administration of justice will perplex the lawyers of A.D. 2000 in quite the same degree that it perplexes us today.

But if we are to discharge our obligation to these noble purposes of our Association adequately and competently in our time, it is clear that we must not neglect the means which have been developed for more certain progress toward these goals. We live in a scientific age. We must be prepared to utilize objective analyses, selective samplings, experimental testings, and other features of the scientific method. Though we do not build bridges, we do maintain the framework of freedom itself—and we have as much need as the engineer for the methods of science. More footwork and less guesswork is required to solve the problems which our nation faces in the broad realm of the law.

The American Bar Center can assist the lawyers of America in fulfilling the objectives of the Association. It will provide a library of information, a clearing house of knowledge and a starting point for broad programs of research. It can elevate the American Bar Association to a new plane of accomplishment. It deserves the financial assistance of all lawyers who believe in the ideals and objectives of our profession.

The Reed-Dirksen Amendment: Developments in the 83d Congress

by **Robert B. Dresser** • of the Rhode Island Bar (Providence)

■ In the January issue, the *Journal* published an article by Mr. Dresser urging adoption of an amendment to the Constitution limiting Congress' power to levy taxes on income, estates and gifts. That article was a reply to Dean Erwin N. Griswold, of Harvard, who opposed adoption of such an amendment on the pages of the *Atlantic Monthly* last summer. This is a supplement to Mr. Dresser's original article, detailing the latest developments in the 83d Congress.

■ In my article published in the January issue of the AMERICAN BAR ASSOCIATION JOURNAL, I discussed at some length the amendment to the Federal Constitution limiting the taxing power of Congress, which was proposed by Congressman Chauncey W. Reed and Senator Everett M. Dirkson, both of Illinois, in identical resolutions introduced by them in the House and Senate in the fall of 1951.

The amendment proposed by them deprived Congress of the power to impose death and gift taxes at any time, and limited the power of Congress to impose income taxes to a maximum rate of 25 per cent, with power, however, by a vote of three fourths of the members of each House, to raise the rate to 40 per cent each year, and with the further power by a like vote to suspend the limitation on income taxes completely during a major war.

On January 9, 1953, subsequent to the publication of my article, Congressman Reed, who is now Chairman of the House Judiciary Committee, introduced the amendment in the new Congress with certain changes (H. J. Res. 103). In a speech made by him at the time of introduction, Congressman Reed, referring to the original amendment introduced by Senator Dirksen and himself in 1951, said:

> Our amendment has been attacked on several grounds. The principal objection made is that the amendment imposes a rigid limitation upon the amount of revenue which the federal government can raise and would, therefore, lead to deficit financing and would impair the government's credit.
>
> This objection is not sound. However, without debating the question here, let me say merely that such fears can be allayed by a change in the form of amendment, without prejudicing the attainment of our basic purpose. With this in view, I have made certain changes in the amendment and am introducing it in the House in its revised form.
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> The changes in the original amendment are confined to Section 2 relating to the income tax. The principal change consists of a provision giving Congress the power by a three-fourths vote to fix a maximum rate in excess of 25 per centum, if such rate so fixed does not exceed the lowest rate by more than 15 percentage points. For example, with a low rate of 20 per cent, the maximum rate could not exceed 35 per cent. This provision is substituted for the provisions of the earlier amendment authorizing a maximum rate of 40 per cent in peacetime and giving Congress the power to suspend the limitation completely during a major war. The new provision, as in the case of the old, applies to both individuals and corporations.
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> By removing all limitations on the amount of revenue Congress may raise from income taxes, either during war or peace, the principal objection made to the earlier amendment is met, and also the necessity of a wartime escape clause disappears. At the same time a curb on excessively high rates is provided by a limitation on the degree of progression where the top rate exceeds 25%. Under the new provision it would be in the interest of every taxpayer to keep not only his own rates but the rates of other taxpayers as low as possible.
>
> It should be observed that, due to the personal exemptions and credits for dependents which have become a well established feature of our tax laws, the possible degree of progression under the proposed amendment would be substantially greater than the 15 percentage points spread. For example, under the present law a person with $2400 of such credits and net income of $4000 before deducting the credits would have his tax cut by the credits from $936 to $355.20, thus making the actual effective rate of tax on his $4000 income about 9% instead of 23.4%. As incomes increase, the effect of these credits on the rates diminishes, thus increasing markedly the real degree of progression in rates between the smaller and larger incomes. It can readily be seen that credits of $2400 would have but little effect on the rate of tax on a $100,000 income.

On January 16, 1953, Senator Dirksen introduced in the Senate a resolution identical in form with the new Reed resolution (S. J. Res. 23).

As Congressman Reed points out in his speech, the bulk of the revenue from the individual income tax

comes not from the taxpayers with the higher incomes, but from the taxpayers in the lower brackets, for that is where the income is.

As he states, 70 per cent of the taxable income of individuals is in the first bracket, which includes incomes under $2000, and 85 per cent of the revenue from the individual income tax is produced by the first-bracket rate of 22.2 per cent, when applied to the entire amount of taxable income in all brackets.

Of the 66,000,000 individual income taxpayers, 57,000,000 have taxable incomes of less than $2000 and are, therefore, in the first bracket only.

Furthermore, the revenue now produced by the rates in excess of 37.2 per cent, which is 15 percentage points above the present beginning rate of 22.2 per cent, is less than $1¾ billion. A tax of 4 per cent on the income of corporations would produce more than this amount. I cite these figures merely to show the amounts involved in the present discussion, and not for the purpose of suggesting the course to be followed.

It is manifest that under the revised amendment there is no legal limitation whatsoever upon the amount of revenue Congress may raise from the income tax either during peace or war. It can do everything that it has power to do at the present time, except to make the difference between the lowest and highest rates more than 15 percentage points where the highest rate exceeds 25 per cent. Where the top rate does not exceed 25 per cent there is no limit on the degree of progression. The beginning rate could, for example, be 1 per cent and the top rate 25 per cent.

As I see it, the amendment in its revised form answers all the critics of the original amendment, unsound though their objections are, except those who insist upon a heavy progression in rates for the primary purpose of "penalizing" the recipients of the middle and higher incomes, despite the relatively inconsequential amount of revenue involved and the exceedingly harmful economic effects of such taxation. Opposition to the revised amendment can be explained only by an adherence to the taxation philosophy of Karl Marx.

In his article in the *Atlantic Monthly* for August, 1952, Dean Griswold says:

> For more than half a century, we have imposed taxes in this country in accordance with ability to pay. Progressive taxation has not merely been accepted, but has been widely hailed as a sound and constructive economic policy.

There probably never was a subject more misrepresented and misunderstood than that of tax rate progression, which its proponents seek to justify as "taxation according to ability to pay".

No one, to my knowledge, has presented a clearer analysis of this subject than Dr. Harley L. Lutz, formerly Professor of Public Finance at Princeton University. In an article published in 1942, he says:

> Since the ratification of the Sixteenth Amendment in 1913 the income tax has been generally regarded as the one perfect tax in an imperfect world. This impression has been the result of fiscal "fifth column" activity, in which almost all professors of economics, including the writer, have had a leading part. In this article the writer undertakes to undo the damage to which he has been a party.
>
> The Sixteenth Amendment says nothing about tax rates, but it has always been assumed that income tax rates should be progressive. The larger one's total income, the higher the tax rate applied at the top. This is called taxation according to ability.
>
> But the ability to pay a tax is no different from the ability to pay rent, or grocery bills, or installments on the radio. It depends on the flow of income receipts.

More recently, in his booklet *Bring Government Back Home*, published in December, 1952, Dr. Lutz says:

> The case against tax rate progression includes two major points:
>
> *First*, the theory on which progression rests is fallacious. The doctrinal support of tax rate progression is the proposition that taxation should be according to ability to pay. . . .
>
> . . . the expression, "taxation according to ability", affords no sound support for tax rate progression. This interpretation was read into the theory of taxation by the academicians who were employing their talents with theories about everything from Hedonism to the marginal utility theory of value and equality of sacrifice in the period preceding ratification of the Sixteenth Amendment. In all of this speculation, these economists neglected the practical application of the reasoning by which they were led to approve tax progression. This method of taxation means that the tax rate is to increase as income rises, which involves the assumption that ability to pay increases faster than income. According to this assumption, a person with an income of $10,000 is able to spend, not merely twice as many dollars in a year as a person with $5,000, but more than twice as many dollars. No reference to obscure economic logic is required to show that this clearly is not the case. The person with an annual income of $10,000 can spend three or four, or ten times as much as the person with an annual income of $5,000 on any particular item, or on a group of items, but in overall he can spend only twice as much, having only twice the income. So far as concerns all of the uses to which income can be put in the market place, ability to pay or to spend is directly proportional to income. The man with $10,000 of income can spend twice as much in total as the man with $5,000, and the man with $20,000 of income can spend four times as much. Since this is so obvious with respect to all market uses of incomes, why should there be a different rule for the use of income, or for the levy upon it, in payments to the government?
>
> The answer is that there is no case in reason or logic for a different rule. A dollar is a dollar and it has no greater weight, value, or significance in paying taxes than in paying the bill of the grocer, the doctor, or the landlord. Stripped of all non-essentials, the case for tax rate progression boils down to the socialist argument for the equalization of wealth and incomes. Those with large incomes will still have more income left, after paying taxes even at progressive rates, than those with small incomes, and the real objective of tax rate progression is the leveling down of all incomes to some mediocre plane. Not all advocates of tax progression are socialists but their advocacy is, in fact, an unwitting support of that equalization which is so basic a tenet of socialist doctrine.
>
> • • •
>
> . . . no equalization of incomes that may be effected by the drastic, arbitrary procedure of progressive tax-

ation can be of any possible benefit to those with low incomes, other than such bitter satisfaction as may be enjoyed by envious souls who would drag all others down to their level, having no inclination to struggle for improvement of their own lot.

The *second* major point against tax rate progression is that, in its practical application, there has been a destructive concentration of burden on the middle incomes. It was this economic group at which Marx particularly aimed in his advocacy of heavy graduated income and inheritance taxes.

There is no sound or scientific basis for determining a tax rate structure that would properly express the relationship between income and ability which the advocates of progression assume to exist. Consequently, the rate scale has been constructed by rule of thumb, guesswork, and appeal to class prejudice. As a result, the progression has always been steepest through the middle income range. The rates applicable to 1952 income begin at 22.2 percent on the first $2,000 of taxable income and rise to 92 percent on income over $200,000. This is a spread of 70 percentage points. The rate on income in the bracket $16,000–$18,000 is 56 percent. This means that almost half of the total rate increase from the bottom to the top of the scale occurs on the first 8 to 9 percent of the taxable income from zero to the income level at which the progression stops. (A rate of 57.1 percent would be exactly half of the entire progression.) The rates of the 1952 scale are higher through the taxable income range $6,000–$32,000 than in any prior act even including those of the war years.

This kind of rate structure demonstrates that the principle of ability has been thrown overboard completely. If we are to believe there has been genuine regard for this principle, then it must be accepted that ability increases at a much faster rate in relation to income through the range from zero to $18,000, than it does through the range from $18,000 to $200,000. This is complete nonsense. . . . Whether those who have been responsible for the construction of the income tax rate scales have realized it or not, their handiwork has been an ideal application of the Marxian doctrine of crushing the *middle class*—the "bourgeoisie". Marx realized that this group would offer the most formidable resistance to his communist revolution. They are too numerous to be liquidated outright, though not numerous enough to protect themselves by political action. The simplest and most effective procedure is to destroy them by excessive taxation.

From this analysis it is concluded that there is no sound case for tax rate progression. The obvious corollary from this conclusion is that the only sound and justifiable method of taxing income is at a *flat or proportional rate*. This, indeed, is what Adam Smith, the originator of the whole ability concept, proposed. His first maxim of taxation, which has been the source of the ability to pay doctrine, was in part as follows:"The subjects of every state ought to contribute towards the support of the government as nearly as possible, *in proportion* to their respective abilities; that is, *in proportion* to the revenues which they respectively enjoy under the protection of the state." [Italics provided.]

The revised Reed-Dirksen Amendment does not *prohibit* tax rate progression. It merely *limits its degree.*

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1953 Annual Meeting and ending at the adjournment of the 1956 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

Nominating petitions for all State Delegates to be elected in 1953 must be filed with the Board of Elections not later than March 27, 1953. Petitions received too late for publication in the March issue of the JOURNAL (deadline for March issue, January 28; deadline for April issue, February 27; deadline for May issue, March 31) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 3, 1953. Ballots must be returned by June 8, 1953.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 27, 1953.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts) nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed on April 3, 1953, to the members in good standing accredited to the states in which elections are to be held as above stated.

BOARD OF ELECTIONS
Edward T. Fairchild, *Chairman*
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The New Patent Statute:

Congress Revitalizes the Patent System

by **Karl B. Lutz** • of the Pennsylvania Bar (Pittsburgh)

■ The problem of our patent policy has been the subject of more than one article in the *Journal* in recent years. Many of the patent lawyers who wrote for our readers expressed strong disagreement with the patent philosophy of recent Supreme Court decisions and urged a revision of the statute. Last summer, Congress voted such a revision. Below, Mr. Lutz examines this new legislation, which went into effect January 1.

■ Congress has once again used its power to legislate concerning patents. On July 4, 1952, it passed the Patent Act of 1952, which was approved by the President and became effective on January 1, 1953. This statute contains provisions which seem certain to revitalize the U. S. patent system.

The new patent statute was drafted primarily as a part of the general plan of revising the U. S. Code and enacting it into law. It is well to remember that the United States Code as originally compiled and published in 1926 was not enacted as law, but was only prima facie evidence of the law. By a fortunate distribution of committee functions, a subcommittee of the House Committee on the Judiciary, charged with revision of the entire United States Code, was also charged with consideration of bills relating to patents. This subcommittee, under Joseph L. Bryson, decided to codify the patent statutes and to incorporate in the new statute some provisions to improve and strengthen the law of patents.

In preparing its first preliminary draft in 1950 this committee studied all existing patent statutes, and in considering amendments of substance consulted the following sources:

> (1) All the bills relating to patents which have been introduced in Congress since 1925, and some earlier bills, together with any hearings and reports on these bills; (2) the reports of the Science Advisory Board (1935), the Temporary National Economic Committee (1941) and the National Patent Planning Commission (1943, 1944, 1945; (3) reports and recommendations of private groups such as the American Bar Association, Patent, Trade-mark and Copyright Section; and (4) miscellaneous sources such as books, articles in legal periodicals, etc.[1]

This preliminary draft was widely circulated to invite criticism and discussion by government employees, by patent lawyers and by representatives of industry. As the result of this thorough discussion of successive drafts over several years, the language of this act was considerably improved and the more controversial provisions were removed. The bill was successfully guided through Congress by Congressman Bryson and Senator Alexander Wiley.

In this new law Congress has legislated for the first time on certain phases of patents, and it has codified some doctrines of patent law that were developed in the courts by "common law" processes. To understand the full impact of the new statute it is important to keep in mind a few basic facts.

Patent System Stems from Constitution

The entire U. S. patent system stems from the constitutional clause which gives Congress power to provide for the granting of patents. Operating under this grant of power Congress has passed various patent statutes, setting up the procedural part of the patent system. But important areas of patent law, relating to questions of novelty and infringement, were left to the courts for development by "common law" processes. In using this power, the federal courts for over a hundred years took a liberal attitude toward patents. They believed that the purpose of the Constitution was to foster and protect invention, and their decisions carried out that purpose.

But since 1930 the U. S. Supreme Court has taken a less benevolent attitude toward patents. It has reversed precedents of long standing; it has destroyed well-established doctrines of the common law of patents; it has taken a harsh attitude toward most of the patents that have come before it.[2] This destructive attitude of the

1. Proposed Revision and Amendment of the Patent Laws, Preliminary Draft with Notes, Committee Print, Committee on the Judiciary, House of Representatives, Government Printing Office, 1950, page vi.

2. For a more complete development of this theme, see "Are the Courts Carrying Out Constitutional Public Policy on Patents?", *Journal of the Patent Office Society*, (October, 1952) page 766.

Supreme Court has naturally been reflected to some extent in the decisions of the lower courts.

Congress, being cognizant of this changed attitude of the courts, has inserted in the new act some provisions which codify the "common law" of patents as it existed prior to the recent apostasy from the benevolent policy of the Constitution. These provisions are worthy of some short attention.

Since the entire federal patent system stems from the constitutional clause on patents, any basic treatment of patent law must start with this clause. In recent years some members of the United States Supreme Court have misread the patent clause as permitting patents only for such startling innovations as "push back the frontiers of chemistry, physics and the like" and "make a distinctive contribution to scientific knowledge".[3] Actually the word "science" does not belong in the patent clause of the Constitution, and the House Committee Report[4] on the new law correctly explains that the Constitution provides for the granting of patents "to promote the progress of *useful arts*".[5] This interpretation is borne out by the first patents issued by the Federal Government, which were for such devices as "A Method for Forming Punches To Impress Marks on Metal", and "An Improved Machine for Roving and Spinning Cotton". Such inventions relate to the "useful arts" (in modern language "practical arts") but do not "push back the frontiers of science".

Common Law of Patents Partly Codified

As stated above, Congress has, until the present statute, left the important question of "novelty" entirely to the courts. This question, sometimes called the "standard of invention", involves the decision as to "how much" novelty a device must have in order to qualify as a patentable invention. At an early date the courts decided that the mere fact that the device had *some* novelty was not enough. It was more difficult to decide *how much* novelty is necessary. In general the courts have held that this is a question of fact to be determined in each individual case. But they have evolved certain helpful rules, such as the rule requiring more than "mechanical skill". This rule has been codified in the new act by stating that the device is not patentable if it "would have been obvious at the time the invention was made to a person having ordinary skill in the art".[6]

The courts also developed certain "objective tests", which are rules of thumb to help determine the presence or absence of invention. These "tests" include the following:

1. Did the invention fill a long-felt want? If the best brains in a particular field have failed for years to solve a pressing problem, and someone comes forward with a solution which is recognized at once as the answer, is not this some evidence of invention? The United States Supreme Court has answered "yes".[7]

2. Did the inventor take the last step necessary to make a practical reality out of what others had unsuccessfully groped for? The Supreme Court has said that this is some evidence of invention.[8]

3. Was the new device immediately adopted by everyone and widely used commercially? This also has been recognized by the Supreme Court as some evidence of invention.[9]

Space does not permit discussion of all the different "objective tests" of this kind that have been applied by the courts. Of course, no one of these tests is necessarily conclusive, and they must all give way in the face of a statutory bar, such as prior use, prior publication or prior patenting. The new act does not expressly codify these objective tests, but it leaves them available for use as evidence that an invention "would not have been obvious".

Not long ago the United States Supreme Court seemed to raise an impossibly high standard of invention, on the theory that an invention can result only from a "flash of creative genius".[10] The new act flatly rejects this view by declaring that "patentability shall not be negatived by the manner in which the invention was made".[11] By inference, this clause requires the courts to apply the well-known "objective tests" mentioned above.

The new law says "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."[12] This approximates another doctrine of the "common law" of patents that has been more breached than honored in recent years. By reaffirming it in this statute in its strongest version, Congress obviously intended that patents should not be lightly held invalid.

The new statute contains a more accurate statement of the rights conveyed by a patent than any previous act. The old statute said that the patent conveys the "exclusive right to make, use and vend the invention". This language seemed to convey a positive right to do the things enumerated regardless of any prior basic patent, and was often so interpreted by those unskilled in patent law.[13] The new act more correctly states that the patent conveys "the right to exclude others from making, using, or selling the invention".[14] This language permits the inventor to exclude others from his invention, but, if his invention is merely an improvement on a prior basic invention, it warns him that the basic inventor may exclude him from the

3. Concurring opinion of Mr. Justice Douglas and Mr. Justice Black in *Great A. & P. Tea Co. v. Supermarket Co.*, 71 S. Ct. 127.

4. 82d Congress. House Report No. 1923, to accompany H.R. 7794, page 6.

5. For a full explanation of this interpretation see "Patents & Science, a clarification of the Patent Clause of the U. S. Constitution", 18 Geo. *Wash. L. Rev.* 50 (1949).

6. Section 103.

7. *Goodyear v. Ray-O-Vac*, 321 U.S. 275 (1944).

8. *Washburn Mfg. Co. v. Beat 'em All Barbed Wire Co.*, 143 U.S. 275 (1892).

9. *Minerals Separation Co. v. Hyde*, 242 U.S. 261 (1916).

10. *Cuno Engineering v. Automatic*, 314 U.S. 89, 91.

11. Section 103, last sentence.

12. Section 282, first paragraph.

13. This statement in the old statute was admirably suitable for use in booklets issued by some of the few remaining advertising patent practitioners. The bare words of the old statute, as quoted in the booklets, often misled their prospective clients into believing a patent would give them a positive right to use their own inventions. But how could anyone criticize the advertiser for mere quotation from the statute?

14. Section 154.

entire field covered by the basic patent.

Prior to this new act the patent statutes made no attempt to cover the question of infringement, leaving it entirely to the courts. In passing on this question the courts developed certain rules of thumb as to the "amount of nearness" to the patented invention that must be present before the court will hold an accused device to be an infringement of the patent. The new act makes no effort to codify the "common law" rules relating to "direct infringement", except to state broadly that whoever uses the patented invention without authority infringes the patent.[15]

In cases of patent infringement it was sometimes found that the "direct infringer" was either financially irresponsible, or was difficult to reach. In such cases the courts resorted to the doctrine of joint tortfeasors to hold as "contributory infringers" those who aided or abetted an infringement. In some of the old cases the courts perhaps went too far in applying this doctrine to help inventors. But in recent years the courts have reacted against these too-lenient cases, and have not only failed to penalize one who would formerly have been held as a "contributory infringer", but have also penalized the patent owner for "misuse" of his patent. This doctrine of "misuse" had recently been carried so far as to actually discourage certain types of invention.

The new statute[16] does not go to the extreme lengths in helping the inventor that some of the old cases on contributory infringement did, but it definitely codifies this doctrine in language that includes a large part of the field covered by the old cases. It also gives the patent owner relief from the doctrine of "misuse" in certain defined areas. Furthermore, the new law does not enact the misuse doctrine, and therefore does not prevent the courts from receding still further from the extreme to which this doctrine has been carried.

This section on "contributory infringement" and "misuse" is probably the most controversial part of the new act, and must be interpreted by the courts. But it is to be hoped that they will carry out the apparent congressional intent of restoring at least part of the doctrine of "contributory infringement", and of restricting the doctrine of "misuse".[17]

Another feature of the new act that is more liberal toward inventors relates to invalid patent claims. A patent usually contains more than one claim, and these claims are looked upon as stating the metes and bounds of the invention. Quite often a claim may be believed to be valid when the patent is granted, but later someone may discover that the claim is invalid over newly discovered prior art which is found as the result of a more exhaustive search. An old rule of patent law said that one such invalid claim would render the entire patent invalid. This doctrine was an historical holdover from the old English rule that any false statement in a patent was an attempt to mislead the Crown, and therefore rendered the entire patent invalid.

The harsh results of this rule had been partially softened by a court-developed doctrine which permitted an invalid claim to be "disclaimed". But even this court doctrine required that the "disclaimer" be filed within a certain period, not too well-defined, and resulted in considerable uncertainty and even hardship. The new statute substantially corrects this situation by stating that "whenever, without any deceptive intention, a claim of a patent is invalid, the remaining claims shall not thereby be rendered invalid".[18] A small remnant of the old rule, however, is still kept to discourage retention in a patent of clearly invalid claims. This is done by providing that, in a suit for infringement, no costs may be recovered by the patentee "unless a disclaimer of the invalid claim has been entered at the Patent Office before the commencement of the suit."[19]

It is generally agreed both here and in other countries, that an inventor is entitled to a greater field of protection than the specific thing illustrated in his patent. One of the time-honored ways of doing this is to claim an element of the device by reference to its "function", *i. e.*, what it does. In recent years some courts have been overly critical of these functional statements,[20] and one section of the new law provides that a claim shall not be held invalid on the sole ground that it contains a functional statement.[21]

Situations arise in which the inventor refuses to sign a patent application, or cannot be found at the time. The new act provides that in such cases a person who can show sufficient proprietary interest in the invention may "make application for patent on behalf of and as agent for the inventor on proof of the pertinent facts and a showing that such action is necessary to preserve the rights of the parties".[22]

Sometimes when a patent applica-

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15. Section 271(a). Making and selling are included in the statutory clause but are omitted in the above statement for purposes of simplification.
16. Section 271 (b), (c) and (d).
17. The doctrine of "contributory infringement" should receive more basic study and discussion than it has in the past, in order to arrive at solutions which encourage invention without imposing undue burdens on commerce. For a study of this type see, "Rational Limits of Contributory Infringement", by Louis Robertson, 33 *Journal of the Patent Office Society* 857 (December, 1951).
18. Section 253.
19. Section 288.
20. *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 92 L. ed. 3, 67 S. Ct. 6.
21. Section 112, Par. 3 .
22. Section 118.

tion is filed, an honest mistake of judgment is made as to whether a particular individual is, or is not, a joint inventor. Previous to this new act such a mistake usually constituted a fatal error that rendered the patent invalid. The new act permits the correction in a patent of a bona fide mistake in joining, or failing to join, a person as an inventor.[23] Other provisions permit adding or withdrawing inventors while the application is still pending in the Patent Office.[24]

The sections of the new statute discussed above by no means exhaust the list of liberalizing changes made by the 1952 Patent Act. But they cover what are thought to be the more important ones, and they amply demonstrate that the new law lives up to its title, which is

> An Act to *revise* and codify the laws relating to patents and the Patent Office, and to enact into law Title 35 of the United States Code entitled "Patents". [Italics added.]

Congress is to be congratulated[25] upon the fact that in thus revising and codifying the laws of patents it has again understood and carried out the public policy embodied in the patent clause of the Constitution. It has kept within the broad limitations expressed in the Constitution, and it has been liberal with inventors and inventions in using its power[26]

> To promote the progress of . . . useful arts by securing for limited times to . . . inventors the exclusive right to their . . . discoveries.

In fact, it is quite possible that the generally favorable attitude of Congress will be even more beneficial than all of the specific liberalizing changes discussed above. The fact that the 1952 Patent Act was passed by unanimous consent shows that Congress is in complete agreement with the conclusion that a strong patent system should be maintained in this country, and that the best public policy on patents is the liberal policy expressed in the Constitution.

23. Section 256.
24. Sections 116 and 118.
25. In September, 1952, the Section of Patent, Trade-Mark and Copyright Law of the American Bar Association adopted the following resolution:
"*RESOLVED*, That this Section goes on record as desiring to commend the Congress of the United States for revitalizing the patent system as an encouragement of invention in all fields, by enactment of the Patent Act of 1952, and to express appreciation especially to the members of the committees and sub-committees headed by Congressmen Celler and Bryson and Senators McCarran and Wiley".
26. U. S. Constitution, Article 1, Sec. 8, Language pertaining to copyright omitted.

Omaha and Richmond

Will Be Hosts to Regional Meetings

■ The Missouri Valley Regional Meeting of the American Bar Association will be held in Omaha, Nebraska, on April 30-May 2 under the general chairmanship of Clarence A. Davis, of Lincoln. The delegates will be welcomed by Governor Crosby of Nebraska, Laurens Williams, of Omaha, President of the Nebraska State Bar Association and W. W. Wenstrand, President of the Omaha Bar Association. Workshop programs will be held by the Sections of Real Property, Probate and Trust Law; Mineral Law; Insurance Law; Taxation; and the Junior Bar Conference. The workshop held by the Mineral Law Section, under the direction of Ray S. Fellows, of Tulsa, will feature outstanding lawyers familiar with the legal aspects of the oil and gas industry and should prove of great interest in view of the recent development of this industry in the Middle West. Harry B. Coffee, President of the Omaha Livestock Exchange, will speak at the dinner on April 30 and the Chairman of the Committee on Communist Tactics, Strategy and Objectives will speak at the luncheon on May 1. In addition plans call for a trial technique demonstration presided over by Joseph W. Henderson, of Philadelphia, and including on the panel Clifford W. Gardner, of Minneapolis, and Judge Gustavus A. Loevinger, of St. Paul. Another event of interest is the World Affairs Assembly introduced by President Storey, with Robert G. Simmons, Chief Justice of the Nebraska Supreme Court, and Frank E. Holman, of Seattle, as speakers. A tour of Boys Town, a tea and fashion show for the ladies and the Junior Bar Conference dance will be just a part of the entertainment provided by the committee. Reservations may be obtained by writing to Clarence A. Davis, Sharp Building, Lincoln, Nebraska.

From May 4 through 6 the Blue and Gray Regional Meeting will be held in Richmond, Virginia. Governor Battle of Virginia, Fred G. Greear, of Norton, President of The Virginia State Bar Association, Drummond Ayres, of Accomac, President of the Virginia State Bar and Melvin Wallinger, President of the Richmond Bar Association, will welcome the delegates. Workshops in taxation problems, real estate, probate and trust law, administrative law and trial tactics will be held. Speakers at the general session on May 5 will include Willis Smith, United States Senator from North Carolina, and Harry F. Byrd, United States Senator from Virginia. A reception given by the Richmond and Virginia bar associations and one held by the Bar Association of the District of Columbia, as well as the Junior Bar Conference dance, will be additional highlights. The general chairman, Charles S. Rhyne, 730 Jackson Place, Washington 6, D. C., reports that, while plans are as yet incomplete, various sightseeing tours to historic sites, including Willamsburg and Jamestown, will be arranged.

The Japanese Judiciary:

A Step Toward Democracy

by Matasuke Kawamura • Justice of the Supreme Court of Japan

■ When the new Japanese constitution went into effect on May 3, 1947, the Japanese people found themselves living for the first time in history under a system of justice administered by independent judges. This article shows the extent of the sweeping changes made in Japanese law by the democratic reforms that followed World War II. The article was prepared by Justice Kawamura with the assistance of the other members of the court.

■ Our country shook herself free from the feudal system at the time of the Meiji Restoration of 1868, and had a rank among the modern states of the world in 1890 through the enforcement of the old constitution (the so-called Meiji constitution), establishing a constitutional monarchy with the doctrine of the separation of powers.

The old constitution, however, could not but be said to be extremely inconclusive, though it had adopted the doctrine of the separation of powers, and to have hardly realized the ideal of the doctrine, because the Meiji Restoration was not a democratic reform in its true meaning and was even retaining the former system to a great extent, and the old constitution itself was mainly modelled after the constitution of Prussia, the typical constitutional monarchy at the time of its adoption. That is to say, the old constitution sustained an organism in which the sovereignty of the state was vested in the Emperor, who exercised the sovereign power. Accordingly, in the old constitution the doctrine of separation of powers was adopted in the form that the legislative power would be exercised by the Emperor with the consent of the Diet; the executive power by the cabinet with the Prime Minister as the head, who was an official of the Emperor; and the judicial power, as a function of sovereign power to be exercised by the Emperor, by the court in the name of the Emperor.

As the result of it, in the days of the old constitution, for example, all legislation was not in the form of law enacted with the consent of the Diet, and it was to a pretty high extent admitted that the Emperor or the Cabinet could ordain the rule curbing the people. In the judicial field, all such matters were not referred to the court as considered to duly fall under the category of the administration of justice in the light of the original mission of judiciary or the mission to determine disputes concerning the rights or the legal relations between the parties. Both the criminal trial to punish an offender and the civil one to aim at settling the disputes between both sides of individuals were solely referred to the court. As to the other disputes on the relation of rights—*e.g.*, the disputes that occur between the cabinet and the people when the cabinet exercises the executive power—the court had no authority. As to such disputes they had to rely upon the function of voluntary and benevolent correction of the supervising government offices, excepting some disputes which could be put to litigation in the Court of Administrative Jurisdiction. Such being the case, it is to be regretted that the rights of the people were not fully protected.[1]

But after the war ended in September, 1945, a democratic reform was launched and carried out in our country. The new constitution (the Constitution of Japan) was enforced on May 3, 1947, and a drastic reform was carried out upon the Japanese political form of the past. The new constitution has manifestly pro-

1. The Court of Administrative Jurisdiction was established in 1890. It was nominally a court, but practically a kind of administrative office. The decision of the court was, in substance, nothing but a supervisory corrective disposition by the supervising administrative office. The Court of Administrative Jurisdiction was abolished as from the time of the enforcement of the new constitution.

claimed that the sovereign power resides with the people, raising high an ideal of democracy. The old constitutional monarchy has been superseded by the constitutional democracy: all the political functions should be exercised by the people themselves; all the affairs of the state should be conducted in accordance with the law enacted by the Diet; all the people are to be equal under the law; and even the action of the government is, like the act of the ordinary individual, subject to the judgment of the courts on whether it is legal or illegal.

As the result of this democratic reform, the judicial power has been remarkably expanded in its content. The settlement of all legal disputes and the maintenance of effectiveness of all statutes and ordinances have been referred to the court. Moreover, the new constitution provides the court with the power to determine the constitutionality of any law, order or regulation as a remedy for evils derived from the system of decision by a majority following the adoption of democracy and accordingly of the Diet-centering principle, enabling the court to proclaim such a law to be invalid because of being unconstitutional as violating the fundamental human rights of the people guaranteed by the constitution when the majority party in the Diet has passed it by vote of a majority. Under the new constitution, the court has become the protector of the rights of the people as well as the watcher over the constitution.

In view of such an important mission of the court the independence of the judicial power—though it was admitted also under the old constitution—has a greater meaning than ever before, and the autonomous independence of the court should be respected to a great extent. Therefore, the new constitution provides for the independence of the judge as follows:

"All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws"; "Judges shall not be removed except by public impeachment" or by judgment of dismissal rendered by the Court of Impeachment of Judges consisting of the Diet members "unless judicially declared mentally or physically incompetent to perform official duties"; "The judges shall receive adequate compensation which shall not be decreased during their terms of office."

Furthermore, for strengthening the autonomous independence of the court, the new constitution has vested the Supreme Court with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs. In the days of the old constitution, the court was not admitted to have such powers.

Besides, the Supreme Court is vested with the power of judicial administration which was in the hands of the Minister of Justice in the days of the old constitution—*e.g.*, the powers to determine the post of judge, to appoint and dismiss personnel of courts other than judges; the powers relating to the accounting business of courts, etc.

Keeping step with the aforesaid provisions the status of the judge has been remarkably elevated. The President of Taishinin (old Supreme Court), the highest judicial officer, was ranked under the Minister of Justice. The Chief Justice of the Supreme Court ranks with the presidents of both Houses as well as the Prime Minister, other judges of the Supreme Court rank with the Ministers of State and judges of other courts are, as a rule, in higher status as compared with executive officers, under the new constitution.

Authority of the Court Is Defined in New Constitution

The court takes cognizance of, and may determine, the causes, various in their nature, passing national and official judgments on the disputes concerning the rights or legal relations. This will be explained more concretely.

There are various kinds of disputes concerning the rights or legal relations. The judgment on whether or not the national right to punish exists and on the matters concomitant therewith is the criminal one, and the judgment on whether or not all other rights or legal relations exist is the civil one. In other words, the state that enacts the laws to maintain order providing in effect that those who violate them shall be punished will (through the procurator, in the name of the government) prosecute those persons who have, or are supposed to have, violated the laws. It is for criminal proceedings to decide whether or not the prosecution is proper and the person punishable. On the other hand, it is for civil proceedings to decide the disputes among the people themselves and the disputes between the state and the people on problems other than the execution of the right to punish—*e.g.*, to decide the dispute on whether the state's administrative disposition is legal or illegal; to determine whether or not the right or legal relation exists.

In addition to the decision and determination of the dispute on whether or not the right or legal relation exists, the court handles such functions as to form, change or extinguish the personal status and other important legal relations because they are of much consequence; declaring the insane person incompetent; partitioning the estate (these are called "domestic cases"); and controlling the protective disposition to correct and rehabilitate any juvenile who has committed or about whom there is apprehension that he may commit crimes or misdemeanors (these are called "juvenile cases").

The procedure to decide the aforesaid cases is, especially when the disputes are tried and heard in open court, ordinarily in the form that the plaintiff—of course the public procurator for the plaintiff in the criminal case—makes an application, the defendant defends himself against it and the court passes judgment after hearing the contentions of both parties. This form is called "action". Both civil and criminal proceedings

are, as a rule, carried out by the procedure of action.

However, such a case as primarily is in no dispute between the parties and consequently considered improper if through the form of opposite contention—*e.g.*, the aforesaid domestic case, noncontentious matters or juvenile case—is not handled by the procedure of action but by the proceedings in which the judge examines the documents or hears the statements of the parties in chambers.

Particular attention should be paid to the point that in accordance with the enforcement of the new constitution the way to exercise the authority of the court or the procedure of action has been greatly reformed simultaneously with the conspicuous expansion of the authority of the court or the scope of the matters handled by the court. In effect, this reform can be said to have absorbed a democratic element to take a serious view of the free will and the fundamental rights of the individual, wiping out the pretty deep color of nationalism and ex-officio-ism seen in the old system or the old procedure.

That is to say, as to the civil case, as stated above, it has come to be admitted that the people may bring action to cancel even the administrative disposition of the state, asserting its illegality in case it is alleged to be illegal. It is a great contribution to the protection of the rights of the people. Concurrently therewith, the amendment to the Code of Civil Procedure effective January 1, 1949, has made it possible that the old type of civil procedure deeply in color of the past ex-officio-ism is replaced by the modern type of civil procedure to enable the trial to be carried out on the parties' own will and responsibility.[2]

On the other hand, there has been carried out a more thoroughgoing reform in the field of criminal procedure which has a particularly close connection with the fundamental rights of the individual. To wit, the old Code of Criminal Procedure in a pretty deep color of ex-officio-ism or oppressive enquiry-ism, though called a modern code of criminal law, was abrogated as of the end of 1948; as from January 1, 1949, the new Code of Criminal Procedure has been effective with an idea to apply the criminal laws and ordinances duly as well as rapidly fulfilling both the maintenance of the public welfare and the guaranty of the fundamental rights of the individual; thus there has been accomplished an epoch-making reform upon the procedure as well as form of criminal procedure.[3]

In addition to that many matters have newly come to be handled by the court in accordance with the amendment to the Civil Code, the Juvenile Law, etc. Furthermore, as from September 23, 1948, the Habeas Corpus Law has come into force, enabling the application for the writ of habeas corpus to be presented to the court as in America and England. Through such new legislation not a few matters have come to be referred to the court.[4]

In short, after the enforcement of the new constitution the authority of the court has been greatly expanded over that in the past and the mission of the court has become particularly grave.

New Constitution Establishes Five Kinds of Courts

There are various kinds of cases to be tried or heard by the court, and, in general, they are divided into big and small or difficult and easy. In order to make the decision correct and proper it is necessary that appeals may be made from the decisions arrived at by the lower courts.

Therefore, various kinds of courts are established by the law. In the days of the old constitution such kinds and structure were provided for by "the Court Organization Law".

Under the new constitution, as stated before, the judicial power and consequently the authority of the court to exercise it have come to have an extremely wide scope as well as important content. According to this, the system of the court has been drastically changed by the new Court Organization Law which provides for the system of the court pursuant to the new Constitution, effective as of May 3, 1947, when the new Constitution came into force. In other words, all the courts in Japan made their start with an utterly new design on May 3, 1947.

According to the Court Organiza-

(Continued on page 253)

2. The main points of amendment to the Code of Civil Procedure are approximately as follows:

(1) The system of ex-officio examination of evidence admitted prior to the amendment has been abolished, and the evidence may be examined in so far as it is tendered by the party.

(2) Under the Code of Civil Procedure prior to the amendment, the examinations of the witnesses and the experts were all exercised by the judge. This system has been abolished and the so called cross-examination system has been adopted.

(3) Throughout all other parts of procedure, there have been established necessary provisions for completing either the expansion of rights or protection of advantage of persons concerned in the trial.

3. The main points of the reform of the Code of Criminal Procedure are as follows:

(1) Under the old Code, the public procurator could exercise such compulsory disposition as arrest, etc. in an emergency, but under the new Code nobody is subject to arrest, seizure, search, etc. not by the warrant issued by the court or judge except in the flagrant offence.

(2) The system of "preliminary examination" in the old code was abolished.

(3) As a rule, the application for release on bail be admitted as made by the accused.

(4) When the accused is poor, the defense counsel be appointed on his behalf at the expense of the state.

(5) When the confession of the accused is a sole disadvantageous evidence to him, he shall not be convicted.

(6) Generally speaking, the status of superiority of the public procurator as the representative of the state to the accused has been wiped out, and in the course of trial the public procurator is put on the almost equal status to the accused.

4. The matters that newly come to be handled by the court in accordance with the amendment to the Civil Code and the Juvenile Law are as follows:

(1) Through the amendment to the Civil Code, our feudal system of "home" has been abolished, and the idea of either the substantial equality of both sexes or the respect of the individual has been thoroughly materialized. As the result of it, there are many cases where the court plays a role of guardian regarding a personal problem for protecting the freedom and advantage of the individual—e. g., the authority to appoint the guardian which was previously exercised by "family conference" has been transferred to the court; the court will make an approval on adopting a minor child after the investigation of the circumstances. These casese are handled as a kind of aforesaid domestic case.

(2) Through the amendment to the Juvenile Law, the authority to determine the step for correcting and rehabilitating the juvenile who committed a crime or the juvenile of whom there is apprehension to commit a crime, previously exercised by the executive office, has been wholly transferred to the court. Such a kind of case is the aforesaid juvenile case.

The Economics of the Legal Profession:

An Analysis by States

by Robert M. Segal and John Fei

■ This is the concluding half of Messrs. Segal and Fei's study of the economics of the legal profession. The first portion appeared last month beginning on page 110. On these pages, Mr. Segal and Mr. Fei continue their analysis of the factors that may affect the income and distribution of lawyers and they advance some tentative conclusions.

V. *Demand for Legal Services by States*

■The demand for lawyers and their legal services in a state comes from various sources. Inasmuch as individuals are important clients, the population of the state is important. In addition to individuals, partnerships and unincorporated business enterprises require the services of lawyers. Furthermore, lawyers, unlike doctors and dentists, have corporations for clients. Recent studies have revealed that in 1947 nonsalaried and part-salaried lawyers together received 47.9 per cent of their total gross income for services to business; the remainder, or 52.1 per cent of their total gross, came from legal services rendered to individuals.[12] Consequently, the state's percentage of lawyers should be related to the state's proportion of human and business populations.

A. *Lawyers and Population by States*

Table 2 gives a breakdown of the population and lawyer ranks by states in 1948.[13] Except for eleven states and the District of Columbia, the table shows a positive correlative between the two ranks. Generally speaking, the states with the highest percentage of lawyers are those with the greatest populations. Furthermore there are a few more lawyers in the industrial states than in the agricultural areas. New York with the first rank in population and lawyer count has the greatest "lawyer concentration" in the country (except for the District of Columbia) with one lawyer for every 497 persons. Pennsylvania ranks second in population but stands fifth in lawyer count and has only one lawyer for every 1,200 persons. Illinois stands third in both ranks and has one lawyer for every 590 persons. In fact, eleven states rank identically in both population and lawyer count ranks and ten other states are within one place of their respective rank in the corresponding column.

Several significant variations, however, are noticeable. The District of Columbia ranks thirty-sixth in the population listing by states but stands eleventh in the lawyer rank. Even if we subtract the number (1,037) of lawyers in public office in Washington, D. C., in 1948, the two ranks are still not closely related. At the same time, if we consider that lawyers in Washington represent individuals, firms and corporations and other lawyers in other parts of the country in their dealings with the Federal Government, the heavy concentration of lawyers in the nation's capital can be understood.

Oklahoma, Florida, Maryland, Kansas, Nebraska and Montana have a high proportion of lawyers, for whereas these states rank 24, 23, 25, 31, 33 and 45 in population, they rank 14, 16, 18, 27, 28 and 41, respectively, in lawyers. On the other hand, Georgia, North Carolina, Alabama, Mississippi and South Carolina have a low proportion of lawyers, for whereas they rank respectively 15, 12, 18, 26 and 28 in population, they stand 20, 24, 29, 34 and 35 respectively, in lawyer count. It is interesting to note that the ranks of Massachusetts and Michigan are interchanged in the two groups.

Although the percentage of lawyers by states shows a positive relationship to the state's population, this approach neglects other important clients of lawyers, including individual enterprises, unincorporated associations, partnerships and corporations.[14] Furthermore legal writers have recognized that the population ratio cannot possibly be used

12. Weinfeld, "Income of Lawyers, 1929-1948", *Survey of Current Business* (August, 1949), pages 2-3.

13. The reason the year 1948 is used is partly because it is a normal postwar year and partly because all the relevant series data are available for the year.

14. See Table 1, page 114 of the February issue.

TABLE 2
Comparison of Lawyer Population and General Population by States
Total Population, 1948: 146,113,000
Total Number Lawyers: 169,489
(Corrected figure based on allowance of dual listings)
Total Number Lawyers Listed: 171,110

1948 Pop. Rank	Lawyer Rank	State	No. of Lawyers	%	1948 Pop. Rank	Lawyer Rank	State	No. of Lawyers	%
1	1	New York	28,618	16.7	31	27	Kansas	1,823	1.1
4	2	Illinois	14,144	8.3	33	28	Nebraska	1,823	1.1
3	3	California	10,744	6.3	18	29	Alabama	1,692	1.0
5	4	Ohio	9,525	5.6	32	30	Oregon	1,604	.9
2	5	Pennsylvania	8,763	5.1	34	31	Colorado	1,584	.9
6	6	Texas	8,223	4.8	29	32	Arkansas	1,478	.9
9	7	Massachusetts	6,950	4.1	30	33	W. Virginia	1,381	.8
8	8	New Jersey	5,827	3.4	26	34	Mississippi	1,368	.8
7	9	Michigan	5,501	3.2	28	35	S. Carolina	1,150	.7
11	10	Missouri	4,934	2.9	35	36	Maine	767	.4
36	11	District of Columbia	4,702	2.7	37	37	Rhode Island	719	.4
					38	38	Arizona	669	.4
10	12	Indiana	3,781	2.2	39	39	Utah	637	.4
13	13	Wisconsin	3,420	2.0	40	40	S. Dakota	625	.4
24	14	Oklahoma	3,379	2.0	45	41	Montana	620	.4
17	15	Minnesota	3,167	1.8	42	42	N. Dakota	509	.3
23	16	Florida	2,949	1.7	41	43	Idaho	459	.3
20	17	Iowa	2,883	1.7	43	44	New Mexico	439	.2
25	18	Maryland	2,801	1.6	44	45	New Hampshire	410	.2
14	19	Tennessee	2,750	1.6	46	46	Vermont	354	.2
15	20	Georgia	2,690	1.6	48	47	Wyoming	286	.2
16	21	Virginia	2,590	1.5	49	48	Nevada	262	.1
19	22	Kentucky	2,569	1.5	47	49	Delaware	249	.1
22	23	Washington	2,429	1.4			Hawaii	191	.1
12	24	N. Carolina	2,400	1.4			Alaska	69	.1
21	25	Louisiana	2,190	1.3					
27	26	Connecticut	2,013	1.2				171,110	

as a good yardstick for the number of lawyers;[15] for instance, Dean Garrison in his Survey of the Wisconsin Bar and in his report to the American Bar Association has noted:

> Attempts have been made to determine whether the bar is overcrowded by comparing the ratio of the bar to the general population; or the ratio of the bar to per capita wealth. The untrustworthy nature of these standards has been demonstrated. The true determinant of the capacity of a given community to absorb lawyers is the amount and quality of legal activity in that community.[16]

Consequently, it would seem to be more significant to study the relationship between the state's percentage of lawyers and the state's proportion of economic factors which help to produce the amount and possibly the quality of legal activity in the state.

B. *Lawyers and Economic Activities by States*

The number of lawyers by states for the year 1948 is highly correlated with various economic factors in the states. Table 3 shows the high correlations between the percentage of lawyers of the state and the percentage of the country's economic activities of the state. A simple correlation coefficient[17] of between .94 and .98 is found between the percentage of lawyers in a state and the state's percentage of wholesale sales, number of manufacturing establishments, number of service trade establishments, number of corporations, retail sales, number of retail trade establishments and service trade sales. A high simple correlation (.89 and

15. See Brown, *op. cit.*, pages 164-185 and footnotes cited therein; Garrison, *op. cit.*; Smith's Foreword to Segal's Article on the "Economics of the Legal Profession in Massachusetts", 23 Boston Bar Bulletin 73 (March, 1952).

16. Garrison, *op. cit.*

17. The coefficient of correlation is a measure of the degree of relationship between two variables; it is an abstract coefficient which is divorced from the particular units employed in a given case. The coefficient of correlation is an abstract measure of the degree to which the average relationship (between the two variables) actually holds in practice.

See Mills, *Statistical Methods* (1928) pages 373-5.

In statistics, a mutual relationship between two variable phenomena is called correlation. "The interest of a statistician is fixed less upon the question whether one phenomenon causes another than upon the discovery of a mutual relationship between the phenomena and upon the measurement of the extent of this relationship." (Crum, *Economic Statistics*, 1928, page 218).

TABLE 3

Correlation Coefficients Between
Percentage of Lawyers by States and Percentage of Economic Activity by States, 1948

1.	Between % of Lawyers and % of Wholesale Sales	= 98%
2.	" " " " " " Manufacturing Establishments (1947)	= 97%
3.	" " " " " " Service Establishments	= 96%
4.	" " " " " " Corporations	= 95%
5.	" " " " " " Retail Sales	= 94%
6.	" " " " " " Retail Trade Establishments	= 94%
7.	" " " " " " Service Sales	= 94%
8.	" " " " " " Country's Population (1948)	= 89%
9.	" " " " " " Wholesale Trade Firms	= 87%
10.	" " " " " " Per Capita Income (1947)	= 33%
11.	" " " " " " Value Added by Manufacture (1947)	= 31%

Sources

For Number of Lawyers see Blaustein, "The Lawyer Count", 36 A.B.A.J. 370 (May, 1950)
For Dollar Value of Wholesale Sales see U. S. Census of Business, *1948 Wholesale Trade*, page 0.04
For Number of Manufacturing Establishments (1947), see U. S. Dept. of Commerce, Census of Manufacture, 1947, page 30
For Number of Service Establishments see U. S. Census of Business, *1948 Service Trades*, page 0.05
Number of Corporations taken from unpublished data furnished to Survey by U. S. Treasury
For Dollar Value of Retail Sales see U. S. Census of Business, *1948 Retail Trade*, page 0.03
For Number of Retail Trade Establishments see U. S. Census of Business, *1948 Retail Trade*, page 0.03
For Dollar Value of Service Sales see U. S. Census of Business, *1948 Service Trades*, page 0.05
For Country's Population, 1948, see *Statistical Abstract of U. S.*, page 28
For Number of Wholesale Trade Firms see U. S. Census of Business, *1948 Wholesale Trade*, page 0.04
For Per Capita Income, 1947, see Supplement to Survey of Current Business, "Regional Trends in U. S. Economy" (1951), page 108
For Dollar Value Added by Manufacture (1947), see U. S. Dept. of Commerce, Census of Manufacture, 1947, page 30

.87 respectively) is also found between the state's percentage of lawyers and state's percentage of population and of the number of wholesale establishments.

At the same time, several of the states show wide variations from these close relationships. For example, five states (District of Columbia, Oklahoma, Arkansas, Kentucky and Nebraska) show relatively high variations percentagewise from their expected percentage of lawyers, as explained by the state's economic activity series studied. In other words, these five states not only have a greater percentage of lawyers than their economic activities would indicate but also their percentage variations are marked. For example, whereas Oklahoma actually has 2 per cent of the total lawyers in the United States, this figure is considerably higher than might be expected from the economic activity (service and wholesale sales or number of corporations) in Oklahoma; furthermore Oklahoma's variation percentagewise is considerably greater than other states which have more lawyers and a higher percentage of the country's lawyers. These conclusions also apply to the other four states.

In several other states, the number of lawyers are below what might be expected from the economic activities of the state. Even though New York has a great number of lawyers (28,616) and accounts for 16.7 per cent of the country's attorneys, New York has fewer lawyers than might be expected judging from the size of its economic activity, as measured by its corporate net income, wholesale sales and number of corporations; furthermore New York even has a greater percentage deviation in the number of its lawyers compared to its economic activities than the other states. Similar situations exist in part in Michigan, Pennsylvania, Connecticut and probably in Delaware.[18]

These extreme variations, which are unexplained by the economic series, may be important in explaining the income data on lawyers.[19]

Per Capita Income Shows Low Correlation with Percentage of Lawyers

Two economic variables (per capita income and the state's percentage of value added by manufacture) show rather low simple correlation coefficients to the state's percentage of lawyers. When the state's proportion of lawyers is compared to the per capita income of the state, the simple correlation coefficient is only

18. The full data on Delaware were not available. It is well known, however, that many concerns are incorporated in Delaware, but these corporations are represented by nearby New York lawyers.

19. See *infra*, pages 17-23.

.33 compared to the high coefficients (.87 and .98) for the other economic variables. This can be explained by the fact that per capita income unlike the other economic variables does not indicate the amounts or *sizes* of those economic activities which have a direct bearing on the demand for services of the lawyers in the various states.

On a rank basis also, the number of lawyers in a state seems to have a low positive relationship to the per capita income of the state.[20] Whereas Nevada has the highest per capita income, with $1,809.00, it ranks forty-eighth in state lawyer rank with 0.1 per cent of the lawyers in the country. California, New York, District of Columbia, Connecticut, North Dakota, Montana, Illinois and New Jersey rank in that order in per capita income but these same states rank third, first, eleventh, twenty-sixth, forty-second, forty-first, second and eighth respectively in lawyer count. Whereas the last five states in per capita income are Kentucky, Alabama, South Carolina, Arkansas and Mississippi, these states rank respectively twenty-second, twenty-ninth, thirty-fifth, thirty-second and thirty-fourth in lawyer count.

While the per capita income of the state shows a low simple correlation with the state's percentage of lawyers, an interesting correlation may be drawn on a rank basis between the numbers of lawyers and the wealth produced by each state as reflected by individual and corporate tax contributions.[21] Texas, Massachusetts and New Jersey are respectively sixth, seventh, and eighth in lawyer count, and are eighth, seventh, and ninth in tax payments. Eleven states are in the same place on both lists; New York and Illinois are first and second on the two rankings; Nebraska is twenty-eighth; Colorado, thirty-first; West Virgina, thirty-third; South Carolina, thirty-fifth; Maine, thirty-sixth; Utah, thirty-ninth; Montana, forty-first; Idaho, forty-third; and Nevada, forty-eighth. Several important variations are found in this relationship. Oklahoma, fourteenth in lawyer population, is twenty-fifth in tax contributions. Florida, sixteenth in lawyer population, is twenty-fourth in taxes; North Carolina is twenty-fourth in lawyer population and tenth in taxes; and Delaware is last in number of lawyers, but thirtieth in taxes. The situation in the corporation state, Delaware, with most of its lawyers in New York and Washington, can be explained but the situations in the other states are not easily explained.

Although there is a very high correlation coefficient (.97) between the state's percentage of lawyers and its percentage of the nation's manufacturing firms, there is a rather low correlation (.31) between its proportion of lawyers and its percentage of the country's value added by manufacture. In part, this might be explained by the fact that value added by manufacture does not indicate volume or number of transactions and furthermore is a very narrow and specific field of economic activity which is not necessarily correlated with those economic and social activities having a direct requirement on the services of the legal profession in contrast to the other broader economic variables which show a very high correlation.

More specifically, by individual fields we can see the very high correlation between nine economic variables and the number of lawyers in the state, as percentages of the country's total.

1. *Corporations and Manufacturing*

A very high correlation (.95) exists between the state's percentage of lawyers and its proportion of the country's corporations.[22] Several areas, however, (Washington, D. C., Tennessee, Oklahoma, Arkansas, Texas and Nebraska) show a markedly higher percentage of lawyers than might be expected from the state's percentage of corporations. On the other hand, New York, Connecticut, Wisconsin, New Jersey, Florida and Massachusetts show a lower percentage of lawyers than might be expected from the state's percentage of corporations. In all these cases, their relative deviations from their expected percentage of lawyers are considerably greater than the other states.

Based on an analysis of corporate net income,[23] several states (Nebraska, Washington, D. C., Arkansas, Florida and Iowa) have more lawyers percentagewise than might be expected from their corporate net income, while Michigan, New York, Pennsylvania and Connecticut show fewer lawyers. In all these nine areas, their relative deviations from their expected percentage of lawyers are very marked compared to the other states.

On a comparison based on rank analysis for manufacturing firms, the seven states (New York, Illinois, California, Ohio, Pennsylvania, Texas and Massachusetts) with the greatest percentage of lawyers also are among the leading industrial states when measured by the number of manufacturing establishments, for New York ranks first, Illinois fourth, California second, Ohio fifth, Pennsylvania third, Texas ninth and Massachusetts seventh. The seven states with the lowest number of lawyers (Delaware, Nevada, Wyoming, Vermont, New Hampshire, New Mexico and Idaho) are also among the states with the lowest number of manufacturing firms (45, 49, 47, 38, 37, 43 and 40 respectively). Value added by manufacture has a low (.31) correlation with the state's percentage of lawyers. Rankwise a closer correlation seems apparent. New York stands first on both lists and accounts for 16.7 per cent of the country's lawyers and 13.0 per cent of the dollar value added by manufacturing in the United States. Illinois with 8.3 per cent of the lawyers ranks second in lawyer count and accounts for 9 per cent of the value added and stands third in this field. Ohio with 5.6 per cent of the lawyers ranks

(Continued on page 258)

20. For data on per capita income, see *Supplement to the Survey of Current Business*, "Regional Trends in U.S. Economy" (1951) page 108.

21. Treasury Department, B.I.R., "U.S. Income Tax Collections by States, 1948"; *World Almanac*, 1949, page 273; see Blaustein, *op. cit.*, footnote 6.

22. Corporation data are obtained from number of returns filed by states by corporations in 1948 to U.S. Treasury (unpublished data).

23. *Ibid.*

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■ *The Judicial Salary Crisis*

To describe the situation with reference to the present level of federal and most state judicial salaries as merely critical is an understatement. In an article in this issue entitled "The Judicial Salary Crisis: An Increase Is Urgently Needed", Morris Mitchell, of Minneapolis, Chairman of the American Bar Association's Committee on Judicial Selection, Tenure and Compensation, sets forth the causes of this crisis. They are (1) high federal income taxation since 1939 of salaries previously exempt, and in numerous cases additional state income taxes as well, and (2) the approximately 100 per cent increase in the cost of living since 1939 and the incident reduction in the purchasing power of the dollar to approximately 50 per cent of the 1939 level. Thus the real salaries of judges in terms of take-home compensation are the lowest they have been in many decades.

The results of these economic factors on judicial salaries are all too plain: (1) judges with financial worries and consequent reduction in working capacity and possible loss of a feeling of independence and self-respect; (2) an alarming increase in resignations of experienced judges from the Bench; (3) the now frequent refusal of able and qualified persons to accept judicial appointments, and (4) the concomitant reduction in the quality of the Bench.

If the judicial department is to remain the strong protector of constitutional government, the independent guardian of the liberties of the people and the completely competent dispenser of even-handed justice between the citizen and his government and between person and person, it is imperative that judgeships be made sufficiently sound economically to attract high-grade talent. In its relationship to the public weal, the cost of so doing is utterly insignificant, since the maintenance of the judicial department, one of the three great coordinate departments of government, is only a small fraction of one per cent of the total cost of maintaining the Federal Government or the government of any state.

Chief Justice Marshall said, "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all." Mr. Justice Sutherland said, "If the political structure erected by the fathers rests upon any one pillar more securely than upon another, it is upon that which upholds the right of the individual to invoke the judgment of the courts of the land upon his conduct."

The call, therefore, is for immediate action by the Bar. The judges themselves cannot undertake the task because such activity is incompatible with their judicial office. But the Bar, with its primary responsibility for improving the administration of justice and maintaining it at a high level, should at once present to Congress and to the several legislatures in states where action is required, the urgency of the prompt upward revision of judicial compensation.

■ *The Japanese Judiciary*

In this issue there appears a paper on the subject of the "Japanese Judicial System under the New Constitution" prepared under the supervision of the Supreme Court of Japan. No one reading that description of the organization and functions of the Japanese judicial system can help but be struck by the tremendous shift in the scope of Japanese judicial jurisdiction and its potential effects on the future growth of Japanese law.

Under the now superseded Constitution promulgated by Emperor Meiji on February 11, 1889, justice was administered by the courts in the name of the Emperor who was the fountain and source of law and of justice. The Japanese Supreme Court under the Meiji Constitution had final jurisdiction in civil litigation and criminal proceedings but its authority did not extend to constitutional questions. Only the Emperor, who under the old Constitution, was "sacred and inviolable" could interpret the Constitution he had so benevolently granted his subjects. Nor did the Supreme Court have any jurisdiction to protect the rights of individuals against measures taken by the administrative agencies of the Japanese government. Individuals who

felt their rights infringed by any such measure had recourse only to a Court of Administrative Litigation. Judicial subservience to bureaucratic fiat was further enforced by a curious clause in the Meiji Constitution which provided that no judge should be deprived of his position "unless by way of criminal sentence or disciplinary punishment", such punishment being administered to judges by the powerful Minister of Justice.

The new Japanese Constitution, promulgated on November 3, 1946, and which became fully effective on May 3, 1947, sweeps away, in terms, at least, these feudalistic remnants which had rendered the Japanese judiciary impotent to prevent the tyranny of totalitarianism.

Unlike our own Constitution, the new Constitution of Japan expressly confers upon the Supreme Court the "power to determine the constitutionality of any law, order, regulation or official act". The embodiment in a written constitution of this common law ideal of the supremacy of the law, with its authority to restrain the exercise of the Executive power itself, has brought to the Supreme Court of Japan a challenge of great gravity and opportunity. Coupled with the new constitutional prohibition that "No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power" and the constitutional mandate that "all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws", the new Constitution blueprints a new Japanese national polity, safeguarding individual freedom and personal dignity.

Unique also in the new Japanese Constitution from the American viewpoint is the constitutional delegation to the Supreme Court of "the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs". Public prosecutors are also made subject to this rule-making power and the Executive effectively shorn of any vestige of power to interfere in judicial administration. Indeed if the National Diet should ever be reluctant to enact judicially sponsored legislative reforms in improving civil and criminal procedures in Japan, it may well be that the Japanese Supreme Court has the constitutional authority to carry out the recommended reforms without benefit of statute. Since experience under the new Constitution shows that the Diet has not yet hesitated to throw its full support in favor of the reorientation of the whole body of Japanese law in keeping with democratic principles, the full scope of the constitutional power of the judiciary may never need to be determined.

Certain it is, however, that no court in modern times ever inaugurated a new era in the administration of justice with greater power, less dependence on the legislative or executive branches, or a heavier responsibility to the people who have entrusted to it the protection of their newly won political freedom, economic opportunity and civil liberties. The Bench and Bar of America may well wish the Supreme Court of Japan godspeed in its adventurous voyage on the troubled seas of representative government.

■ *We Need Not Be Humdrum*

"A word fitly spoken is like apples of gold in pictures of silver." Few are more able to testify to the virtue of that ancient observation than the members of the legal profession, for the man upon the bench and the lawyer at the Bar do much reading. A word which is the image of the thought in the writer's mind brings delight. But much that is found in the lawbooks is humdrum in style. Few judges have the attractive literary style of Cardozo, Holmes and Learned Hand. Few can make a word speak with the clarity and force of Hughes. Lawyers in preparing briefs seldom realize that a writer who can make one word do the work of two is an *amicus curiae*. All hope that their writings will have enduring value, but not many realize that "style rather than thought is the immortal thing in literature".

Recently there came from the pen of Judge Nordbye, who for a score of years has graced the Federal Bench in Minnesota, a decision, reviewed in Courts, Departments and Agencies, which pictured in such a graphic manner a primitive area in the Far North that the words themselves waft the reader to the solitude and primeval beauty of the distant area. Here, in part, is what the Court wrote:

> From the days of the voyageurs, it has been a canoe country, and the innumerable lakes and connecting streams with adjacent portages furnish an almost endless variety of trips by water. Perhaps no other place in the United States is so steeped in the lore of the Indian and fur trader, who traditionally used these waterways before the Northwest was settled. Public interest in the conservation of this area so that it might be retained in its primitive condition undoubtedly motivated the Secretary of Agriculture in establishing regulations so that the intrusion of automobiles and other vehicles would not destroy the unique recreational appeal of this Forest Reserve. The Roadless Areas have been augmented from time to time and now aggregate approximately one million acres.
>
> Initially, at least, the Roadless Area as established by the Secretary of Agriculture resulted in the preservation of the charm and primitiveness of this wilderness region so that its recreational advantages had an unusual attraction to those who sought a retreat under such circumstances and conditions. . . . In fact, one of the defendants' resort advertisements refers to the Roadless Area as the reason for the good fishing there and expresses the hope that such conditions may continue, stating:
>
> "I pray the good Lord daily that my camp remain roadless. Doubtless you are aware of what auto highways mean to good fishing.—Amen."

What a relief it will be to a toiler in a musty law library to encounter those vivid passages. Their magic spell will carry him to the trackless wilderness of the trapper and the voyageur. Lawbooks have no pictures, but words which bring visions of "the charm and primi-

tiveness of this wilderness region" serve an even better purpose. When the reader returns to the tome in front of him he can tolerate better the abstract and the humdrum.

The attractive descriptive material was succeeded by an interesting ending. It sustained as valid an executive order which prohibited airplane flights lower than 4,000 feet over the roadless area which was pictured by Judge Nordbye's heart and pen.

Editorial From a Member of Our ADVISORY BOARD

■ *The Function of the Courts in a Period of Change*

In a period of social change, two forces are at work, one that leads to change, the other that resists it. If the outcome is to be for the good of society, there must be an intermediate force, which must be the force of reason, not that of blind and partisan power. The courts can, if they will, serve as such an intermediary.

Change is an historical fact. In the nature of things, it is a quality of social life. In every change, law plays its part. The abandonment of the feudal system; the coming of democracy; the industrial revolution; the growth of business and corporate finance; the advance of science and technology; the rise of labor to a position of power: all such changes need the law for their implementation, and therefore they deeply influence our jurisprudence.

The legislative aspect of this implementation is accomplished in broad, sometimes sudden steps. There ought to be a law; and after agitation or deliberation, short or long, suddenly there is a law. It may be women's suffrage, workmen's compensation, regulation of securities, the Wagner Act, the Smith Act, the McCarran Act, or any one of a host of statutes which plot the pendulum of social conflict at a given time. Where there was no law before, suddenly there is a law. Or where the law was one thing, on a given date it becomes something quite different. Thus there is a sweeping character about the legislative process which makes it especially adaptable to change and the spirit of the times.

When this occurs, two things happen to the judiciary. The judiciary must deal with the legislation, in respect of its validity and of its interpretation. At the same time, it must be constantly exercising its common law responsibility in view of the change which is taking place.

These are grave tasks. In discharging them, the judge stands as the arbiter and thus gives a balance to competing social forces. He cannot, nor should he, dissociate himself from the time in which he lives, because laws should be related to the conditions of time and place. At the same time, he should not dissociate himself from the past, because the past is experience, which is a living source of the law.

Above all, the judge should not yield to the temptation of fragmentizing the law by judgments of expediency which shatter the integrity of the law in the interest of apparent social gain. The reason is that the integrity of the law is itself a valuable social asset, and moreover, the law is an organic thing capable of keeping pace with social needs.

If these observations are correct, they are especially applicable to the present day, when the trend is toward social security, equalizing the social structure, regulation of industry, distribution of wealth, law by administrative decree and the many other elements which characterize our age as one of profound change.

In this situation, it is not surprising that here and there in the judiciary there are judges who in their zeal for change find the law irrelevant and move toward their objective without regard to the canons of their craft. The reports are replete with instances where the desire for distribution of wealth or for social equality causes a court to violate some basic principle of statutory construction or of the law of contracts or torts, or where it creates a cause of action which should have awaited a statutory basis. Such a judicial policy discloses a lack of faith in law itself and a forgetfulness that the alternative of organic integrity in the law is anarchy and eventual injustice. It sets the judge above the law and above the limitations our form of government places upon him. And it is disdainful of the wisdom of Sir Frederick Pollock, who, in his dedicatory letter to Justice Holmes in his work on torts, said that "the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances".

The judiciary should neither be oblivious to the times nor a product of them. It should view the times clearly and should willingly serve as an instrument of change, but as an enlightened instrument and as one bringing to the conflicts of the times the balancing effect of the law. And the judiciary should recognize that law will be an agency of justice only if it possesses the inner integrity and the organic growth which are parts of its nature.

HAROLD R. MCKINNON
San Francisco, California

Books for Lawyers

AMERICAN LAW OF PROPERTY. *By A. James Casner, Editor-in-Chief, and twenty-four Coauthors. Boston: Little, Brown and Company. 1952. $115.00. Volumes VII; Pages cxxxi, 5832.*

American Law of Property represents a singular type of venture in legal writing. So far as the present writer is aware it is the first major property work in which a large group of coauthors has participated. The Editor-in-Chief and the publishers are of course to be commended for recognizing the need for a new treatise in this complex area. But, more than that, they are to be congratulated upon their appreciation of the fact that an ever-growing body of decisions has made the production of a really scholarly work covering so broad and important a segment of American law an almost impossible undertaking for any individual or small group of individuals. The scholarly character of these volumes is evidenced by the known abilities of their distinguished coauthors. They will be named here in connection with a listing of the several parts of the treatise which seems desirable in order that its broad scope may be made apparent.

Part 1 (sixty-nine pages, Lewis M. Simes, University of Michigan Law School) describes the historical background of the law of property. Part 2 (ninety-eight pages, Russell D. Niles, New York University School of Law, and William F. Walsh, late of New York University School of Law) discusses types of freehold possessory estates and their characteristics. Part 3 (228 pages, Hiram H. Lesar, University of Missouri School of Law) deals with landlord and tenant. Part 4 (207 pages, Professor Simes) treats types of future interests and their characteristics. Part 5 (297 pages, George L. Haskins, University of Pennsylvania Law School) is concerned with estates arising from the marriage relationship and their characteristics. Part 6 (116 pages, Dean Niles and Professor Walsh) relates to concurrent estates and their characteristics. Part 7 (101 pages, Cornelius J. Moynihan, Boston College of Law) examines community property. Part 8 (108 pages, Oliver S. Rundell, University of Wisconsin Law School) depicts the law of easements and licenses. Part 9 (169 pages, Russell R. Reno, University of Maryland School of Law) investigates covenants, rents and public rights. In Part 10 (330 pages, Victor H. Kulp, University of Oklahoma School of Law) oil and gas rights are considered. Part 11 (198 pages, Sidney P. Simpson, late of New York University School of Law, John P. Maloney, late of St. John's University School of Law, and Rufford G. Patton, Land Registration Department, Hennepin County, Minnesota) inquires into the law of vendor and purchaser. In Part 12 (277 pages, R. G. Patton) deeds are studied. Part 13 (67 pages, R. G. Patton) explores transfers by judicial or statutory process. The subject matter of Part 14 (200 pages, Thomas E. Atkinson, New York University School of Law) is title after probate action. Part 15 (121 pages, R. G. Patton) is an exposition of other methods of acquiring title to land. In Part 16 (517 pages, George E. Osborne, Stanford University Law School) mortgages are reviewed. In Part 17 (126 pages, R. G. Patton) consideration is given to priorities, recording, registration. Part 18 (203 pages, Carrol G. Patton, Land Registration Department, Hennepin County, Minnesota, and R. G. Patton) elucidates the problems involved in examination of title. Part 19 (66 pages, Dean Niles and John Henry Merryman, University of Santa Clara College of Law) is a discussion of fixtures and things growing on the land. Part 20 (53 pages, Professor Merryman) portrays the law of waste. Part 21 (110 pages, A. James Casner, Harvard Law School, and David Westfall, of the Chicago Bar) deals with construction problems. In Part 22 (217 pages, Professor Casner) the Editor-in-Chief analyzes class gifts. In Part 23 (199 pages, Charles C. Callahan, Ohio State University College of Law, and W. Barton Leach, Harvard Law School) powers of appointment are scrutinized. Part 24 (162 pages, Professor Leach and Owen Tudor, of the Boston Bar) and Part 25 (239 pages, Horace E. Whiteside, Cornell Law School) probe respectively the problems to which the common law Rule against Perpetuities and statutory rules (perpetuities and accumulations) give rise. In Part 26 (180 pages, Merrill I. Schnebly, University of Illinois College of Law) restraints upon the alienation of property are analyzed. Part 27 (102 pages, Olin L. Browder, University of Oklahoma School of Law) concerns itself with illegal conditions and limitations. Part 28 (Clyde O. Martz, University of Colorado School of Law) will appear this year as a supplement to Volume VI, of which rights incident to possession of land will be the subject matter.

The length and contents of the preceding paragraph are of themselves sufficient to show, as is stated in the Preface, that "*American Law of Property* deals comprehensively with the law of land, yet it is not exclusively a treatise on real property". It is hardly necessary to state that the work also deals comprehensively with synchronous problems arising in the fields of trusts, future interests and in connection with the construction of instruments creating these. This extensive treatment is supplemented by an exhaustive, analytical Table of Contents and Chapter Analysis (72 pages), a complete Table of Cases (514 pages), a Table of Statutes (59 pages) and an effec-

tive Index (438 pages). Where authority on a given point is needed it is to be found in abundance in footnotes which contain not only decisions and their official and unofficial citations but also appropriate references to the *Restatement*, to other treatises and to helpful periodical literature. One is also pleasantly surprised to find a generous number of cross-references, which, because the various parts were prepared by different authors, must have presented unusual mechanical problems, if not for the authors, at least for the Editor-in-Chief and the publishers. In short, the treatise is prepared in a fashion which insures its value as a research tool of first importance.

Something of the enormous labor involved in the preparation of *American Law of Property* may be understood when it is realized that it was first commenced in 1939. To the present writer any extensive unfavorable criticism of a work of such magnitude and quality as this would seem presumptuous despite the fact that caviling is apparently in the best tradition where book reviews are concerned. In this case the only criticisms one could offer would fall within the realm of opinion. The Editor-in-Chief says in the Preface that, "Decisions as to inclusion or exclusion had to be made, and it is a fair prediction that no two minds would come to exactly the same conclusion." True to this prediction, there are phases of the law of property which the present writer feels may have deserved more emphasis, but the Editor-in-Chief has the answer for he hastens to add that "If it proves that we have omitted matters which the profession at large needs, this can be remedied in a supplementary volume—and the pattern of the work is such as to permit this." It is also stated in the Preface that one of the major objectives of the treatise was, "that the treatment of each segment should be analytical in approach and practical in impact... [that] the work should not be a mere compendium of rules and citations nor should it be a spinning of theories by academicians". No part of these volumes could be characterized as a "mere compendium of rules", but it seemed to me that the desire that they be "practical in impact" may at some points have abridged the "spinning of theories" just a bit more than necessary or desirable. However, this again is purely a matter of opinion which is at least in part belied by the decision of the Supreme Judicial Court of Massachusetts in *Sears* v. *Dumaine*, 108 N.E. 2d 563, 567 (Massachusetts, 1952) where the court relied upon *American Law of Property*. Thus the work has already achieved one of its stated aims of providing "a critique of existing rules which may indicate the direction of change in the law and may be the deciding factor in a close case".

The purpose of a book review should be to assist the reader in deciding whether or not the particular work under discussion would or might be useful to him. Most readers of this review will probably be lawyers whose practice more or less frequently involves them in property problems. The present writer's evaluation of *American Law of Property* is implicit in what has already been said here. Explicitly stated, it is this: If property, trusts or future interests fall within the field of your practice you ought to own this treatise unless it is available in a library just around the corner. And even if it is, perhaps you should own it anyway because you may be assured that it will be in constant demand. This work is a monument to its Editor-in-Chief and its coauthors and to its publishers; it will take its place among the great works in American law.

DANIEL M. SCHUYLER
Northwestern University
Chicago, Illinois

ANNUAL SURVEY OF AMERICAN LAW. 1951. *New York University School of Law. New York: Prentice-Hall, Inc. 1952. $10.00. Pages x, 995.*

As everybody knows, the *Annual Survey* was established by Arthur T. Vanderbilt when he was Dean of New York University Law School. That distinguished jurist has made many notable contributions to American law; and the Survey stands high on the list. One who consults it is able to grasp—better than in any other way—what of significance has been added during a twelve-month to the body of American case law and what notable articles have appeared in legal publications.

The *Survey* for 1951 is dedicated to Robert P. Patterson and the Foreword by Chief Justice Vanderbilt is a worthy tribute to that sound lawyer, just judge and distinguished public servant. The practice of thus dedicating each annual *Survey* to some lawyer of great distinction must have a tonic effect upon each of the nearly fifty contributors whose chapters make up the volume. Each chapter is a lawyer-like piece of work and each writer is entitled to think of himself as having joined in an appropriate offering to the memory of an outstanding American.

The chapters are grouped under descriptive captions: "Public Law", "Private Law", "Adjective Law", and "Legal Philosophy, History and Reform". A reviewer with sixty years of teaching and practice behind him finds himself more or less unconsciously dividing the chapters into three classes: those that deal with fields of law in which he is at home, those that are concerned with fields in which he is a timid visitor and those into which he ventures only when roped to an experienced guide. Private law, business and labor regulation and tax law correspond roughly with this threefold division. Excellent as are the surveys of developments in the field of private law, they are less valuable to a veteran lawyer than those which help him to find his way in more unfamiliar terrain. He will particularly appreciate the chapters grouped in Part Two ("Public Law: Social, Business and Labor Regulation") and he will welcome the guidance of the learned authors who, with easy familiarity, elucidate the mysteries of income, federal estate and gift taxation.

Lest what is here said be thought to minimize the importance of pri-

vate law let it be frankly stated that the chapters under this head have given the reviewer more pleasure than any of the others. If it be not invidious to particularize, a word of commendation should be spoken about the chapters on future interests, on agency and partnership and on corporations. The chapter on legal education is most enlightening. The body of references in that chapter to developments in legal ethics and professional standards is a most valuable compilation.

In summary, let it be said that the 1951 *Survey* conforms to the standard of excellence heretofore established. The volume is really indispensable to one who desires to keep abreast of legal development.

GEORGE WHARTON PEPPER
Philadelphia, Pennsylvania

FARMER'S INCOME TAX, 1953. *By Samuel M. Monatt. Chicago-Commerce Clearing House, Inc. 1952. $3.00. Pages 175.*

Mr. Monatt in the foreword of this book states: "The aim of this book is to give you, in the clearest and quickest way possible, the tools for the proper preparation of the farmer's income tax return." There is undoubtedly a need for a work devoting special attention to the tax problems of farmers because of the phenomenal increase in the Cadillac-owning members of that group and their ascendancy into the higher tax brackets.

To accomplish his aim Mr. Monatt reproduces the proper forms filled in with hypothetical transactions and follows with a detailed description and explanation of their treatment. To the reviewer, lacking benefit of a farmer's experience, the problems posed and examples given seem most complete. Indeed, the situations set forth include those not peculiar to farmers but applicable to taxpayers generally. The inclusion of information outside the farmer's special problems, where to file returns, deductions such as gifts to charities, exemptions, dividend income, filing joint returns, etc., indicates that the book was written for the attorney without a great amount of tax practice or experience and perhaps even the layman. This indication is reinforced by the fact that there are very few citations to cases, regulations or even code sections. For instance, Section 117 (j) (3) is not cited when describing the effect of a sale of land with unharvested crops thereon. The tax practitioner would find the lack of such citations disconcerting.

The volume is well indexed and contains an excellent system of cross references and a complete check list. All in all, the attorney with farmer clients can make good use of this book, which would save him many hours of troublesome research in the preparation of income tax returns.

WILLIAM LOGAN MARTIN
Birmingham, Alabama

THE COURT OF LAST RESORT. *By Erle Stanley Gardner. New York: William Sloane Associates, Inc. 1952. $3.50. Pages 277.*

When a case of miscarriage of justice or a conviction of an innocent person comes to public attention, the lawyer is likely to find himself cornered by irate layman friends who seem to think that "the law" as an institution is reprehensibly responsible for the whole thing, and that Mr. Lawyer is trafficking in a somewhat less than nice profession. It means little to point out that some lawyer or lawyers served (possibly gratis) as defender of the aggrieved person, that some lawyer or lawyers probably uncovered the miscarriage and that after all the original damage was not committed by the lawyers or "the law" but by the twelve good laymen and true who voted for the conviction. Erle Stanley Gardner's readable book concerning the efforts of one group to take an active interest in cases of miscarriage of justice should do much to lay this canard in a welcome grave.

Mr. Gardner is widely known for his mysteries, but he was, before the authorship of novels forced him to quit, a practicing lawyer. He knows, as do all practicing attorneys, that prosecutors, police officers, courts and juries can and sometimes do make grievous mistakes. Books about innocents convicted are not rare. What is rare and refreshing about Mr. Gardner's book is that it demonstrates that an active and professionally competent group is doing something about it.

The Court of Last Resort refers to the name applied to themselves by a group of people organized to investigate cases of wrongful convictions and by the force of publicity attempt to help the victims. The adventures of this group as they tirelessly investigated, resurrected and attempted to put right the cases of wrongful conviction which came to their attention form the fascinating material of this book.

When you're tired of the workaday world pick up this book and read the refreshing story of the lengths to which some people have gone to right a wrong.

RICHARD B. ALLEN
Aledo, Illinois

THE BLACK MARKET. *By Marshall B. Clinard. New York: Rinehart and Company, Inc. 1952. $5.00. Pages 358.*

This 358-page book is a detailed historical account of black market operations during World War II, with a look, in Chapter 13, to the future of the black market. It is not of particular interest to lawyers. It takes a very serious view of the extent of the black market and its sociological effects. On page 27 the author states that very shortly after the creation of price controls a black market of "immense proportions" engulfed our country in a relatively short period of time. The author quotes authority that black market commodities include nylon stockings, butter, ales, machinery, lumber, gasoline and almost everything entering into the activities and life of the country.

That the black market included persons of good standing is recognized. On page 30 the author quotes a businessman as stating: "Everyone

is crooked, including myself. They are all crooked one way or another."

On page 51 the author states that considering the nature and extent of the black market, it is not surprising that the Government encountered such tremendous difficulties in its attempts to control it. The attitude of the author toward the Government in its efforts to control prices is very sympathetic. He even seeks to evolve a theory of crime that would be applicable to a burglar and a black market offender equally. See page 286. Nevertheless, the author concedes on pages 300, 301, that in some instances almost entire industries were guilty of black market violations. In spite of this fact, the author seeks to explain participation in black market violations by "egocentricity, emotional insecurity, feelings of personal inadequacy, negative attitudes toward other persons and relative lack of importance of one's personal, family or business reputation".

The author does not advert to certain theories of jurisprudence that where violations of laws are so widespread there may be something wrong about the law itself, *e.g.*, the noble experiment. Indeed, there was and is a belief entertained by many writers and persons that there never was any sincere thought that prices would be controlled or that it was desired that they would be controlled.

On page 89 the author quotes a suggestion that price control efforts were hopeless because the American people were never really in favor of price and rationing controls. The American people has demonstrated over and over again its patriotism and willingness to make sacrifices of all kinds for the welfare of the country, particularly in time of war. It is suggested that the lack of respect for the laws attempting to regulate prices and rationing during the Roosevelt and Truman Administrations arose from the lack of statesmanship and hypocrisy of the leaders themselves. It was well known to the leaders, as to the educated public generally, that it was impossible to regulate prices without regulating wages. The result would inevitably be a squeeze in which additional expense on account of increased labor costs could not be met from the controlled price. Presidents Roosevelt and Truman, fully aware of this, were nevertheless unwilling for purely vote-getting reasons to place wages under controls. The results were inevitable, recognized by all intelligent people as inevitable, and naturally the law was a subject of contempt, rather than respect.

WALDEMAR Q. VAN COTT
Salt Lake City, Utah

Nominating Petitions

(Continued from page 191)

J. C. Pittman, of Sanford;

Edward K. Proctor and J. B. Eure, of Whiteville;

David H. Scott, John A. Stevens, Isaac C. Wright, Murray G. James, James D. Carr, Charles Cook Howell and Robert E. Calder, of Wilmington.

Tennessee

■ The undersigned hereby nominate Charles G. Morgan, of Memphis, for the office of State Delegate for and from the State of Tennessee to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Walter Chandler, J. H. Shepherd, J. Seddon Allen, W. Percy McDonald, Blanchard S. Tual, Dave Ballon, Edward W. Kuhn, F. B. Gianotti, Jr., Jack Petree, Ernest Williams, Samuel O. Bates, Marion G. Evans, Leo Bearman, Charles L. Glascock, George M. Klepper, W. Percy McDonald, Jr., Lewis R. Donelson III, Elisha Gee, Jr., John S. Montedonico, Frank J. Glankler, Hamilton E. Little, John R. Gilliland, J. E. McCadden, Benjamin Goodman, Jr. and Thomas R. Prewitt, of Memphis.

Vermont

■ The undersigned hereby nominate Osmer C. Fitts, of Brattleboro, for the office of State Delegate for and from the State of Vermont to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Richard E. Davis, of Barre;

Norton Barber, Francis E. Morrissey and Collins M. Graves, of Bennington;

Philip H. Suter, Paul N. Olson and James L. Oakes, of Brattleboro;

A. Pearley Feen, Philip H. Hoff, David W. Yandell, Allan Bruce and Leon D. Latham, Jr., of Burlington;

P. R. MacCausland, of Essex Junction;

James S. Brock and Deane C. Davis, of Montpelier;

Walter H. Cleary, of Newport;

J. Malcolm Williams, of Poultney;

John C. Sherburne, of Randolph;

Charles F. Ryan, James T. Haugh, Olin M. Jeffords, Robinson E. Keyes, John D. Carbine and Harold I. O'Brien, of Rutland;

Charles B. Adams, of Waterbury.

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

APPEALS

Judgment of State Court Vacated Because of Doubt Whether It Rested on Adequate Nonfederal Ground

■ *Dixon* v. *Duffy*, 344 U. S. 143, 97 L. ed. (Advance p. 137), 73 S. Ct. 193, 21 U. S. Law Week 4050. (No. 4, decided December 8, 1952.)

In 1952 petitioner, a prisoner in San Quentin, filed application for a writ of habeas corpus in the Supreme Court of California. That court denied the application summarily, with two dissents. The United States Supreme Court granted certiorari. The Attorney General of California, appearing for respondent, argued that the judgment of the California Supreme Court rested on an adequate nonfederal ground, in that the petitioner could and should have presented his federal claim in an appeal from his original conviction. The Supreme Court thereupon continued the cause to enable petitioner's counsel to secure a determination from the Supreme Court of California whether its decision rested on an adequate state ground. The Clerk of the Supreme Court received a letter from the Clerk of the California court on the matter, but there was no official determination, the California court doubting its jurisdiction to make such a determination.

In an opinion by the CHIEF JUSTICE, the Court vacated the judgment of the California court and remanded the cause for further proceedings in order to remove the doubt as to jurisdiction.

Mr. Justice JACKSON wrote a dissenting opinion in which he declared that the petition for certiorari should have been dismissed as improvidently granted.

The case was argued by Franklin C. Stark for petitioner, and by Clarence A. Linn for respondent.

APPEALS

Temporary Injunction of Peaceful Picketing Held Not To Be Reviewable Because Judgment Below Was Not Final

■ *Montgomery Building and Construction Trades Council* v. *Ledbetter Erection Company, Inc.*, 344 U. S. 178, 97 L. ed. (Advance p. 127), 73 S. Ct. 196, 21 U. S. Law Week 4043. (No. 43, decided December 8, 1952.)

An Alabama court issued a "Temporary Writ of Injunction" against certain picketing activities, wholly peaceful, carried on by petitioners. A motion to dissolve the injunction was denied and the Supreme Court of Alabama affirmed. The Supreme Court of the United States granted certiorari.

In a brief opinion, Mr. Justice MINTON, speaking for the Court, dismissed the petition for certiorari as improvidently granted, on the ground that the Court had no jurisdiction to review an interlocutory judgment of this nature. The Court cited *Gibbons* v. *Ogden*, 6 Wheat. 448, 5 L. ed. 302, as decisive, although it admitted the force of the argument that so long as the temporary injunction was in force, it was as effective as a permanent injunction, and that to await the outcome of the final hearing would moot the question and frustrate the picketing. The Court said that it could not enlarge its jurisdiction to intervene in a case of this sort.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, dissented, saying that the "assertion by a state court of *power* to act in an interlocutory way is final. Whether it has that *power* may be determined without reference to any future proceedings which may be taken".

The case was argued by Herbert S. Thatcher for petitioner, Jack Crenshaw for the respondent, and Mozart G. Ratner, for the NLRB as *amicus curiae*.

CERTIORARI

Writ of Certiorari Dismissed on Ground That Petition Was Not Filed Within Ninety-Day Period After Final Judgment of Court Below

■ *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206, 97 L. ed. (Advance p. 200), 73 S. Ct. 245, 21 U. S. Law Week 4084. (No. 11, decided December 22, 1952.)

In 1943, the Federal Trade Commission issued a three-count complaint against respondent, Minneapolis-Honeywell Regulator Company, charging violations of the Federal Trade Commission Act, the Clayton Act and the Robinson-Patman Act. After a protracted administrative proceeding, the Commission decided against respondent on all three counts and issued a cease-and-desist order in three parts, covering each of the three violations. Respondent sought review in the Court of Appeals for the Seventh Circuit; the Commission sought enforcement of all parts of its order in a cross-petition. Respondent abandoned its attack on Parts I and II of the order, and its briefs and oral argument made it clear that the legality of Part III was the only contested issue. On July 5, 1951, the Court of Appeals announced its decision, stating that since respondent did not "challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them". The judgment which the court entered upon the day just indicated held that Part III of the order could not be sustained and should be reversed. On August 15, the Commission filed a

Reviews in this issue by Rowland L. Young.

memorandum with the Court of Appeals, pointing out that Parts I and II of the order had not been contested and that the Court of Appeals had made no disposition of them. On September 18, the Court of Appeals issued what it titled a "Final Decree", reversing Part III of the Commission's order and affirming Parts I and II. The Commission applied to the Supreme Court for a writ of certiorari on December 14, 1951; in its grant of the writ, the Court asked counsel to discuss the "timeliness of the application".

The CHIEF JUSTICE wrote an opinion dismissing the writ of certiorari for want of jurisdiction. The Court held that the date of the final judgment of the Court of Appeals was July 5, which meant that the Commission had filed its petition for certiorari after the expiration of the ninety-day filing period. The Court refused to treat the Commission's August 21 memorandum as a petition for rehearing and it held that the "final decree" of the Court of Appeals handed down September 18 had no significance so far as the issue of timeliness was concerned. " . . . the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." The Court declared that the test was whether the lower court's second order disturbed or revised legal rights that its prior judgment had plainly and properly settled with finality.

Mr. Justice BLACK, in a dissenting opinion, declared that "no statute, precedent or reason relied on by the Court requires dismissal of this cause". He viewed the September 18 decree as the final judgment, arguing that it was so treated by the lower court and by the parties.

Mr. Justice DOUGLAS noted that he joined with Mr. Justice BLACK "in the parts of his opinion which deal with the question whether the petition for certiorari was timely. . . ."

The case was argued by Acting Solicitor General Robert L. Stern for the Commission, and by Albert R. Connelly for the respondent.

COMMERCE

Arkansas Statute Requiring Contract Carriers To Obtain Permit To Use State Highways Held Not To Be an Undue Burden on Interstate Commerce

■ *Lloyd A. Fry Roofing Company* v. *Wood*, 344 U. S. 157, 97 L. ed. (Advance p. 145), 73 S. Ct. 204, 21 U. S. Law Week 4046. (No. 37, decided December 8, 1952.)

Petitioner, the Lloyd A. Fry Roofing Company, was a manufacturer of asphalt roofing products in Memphis, Tennessee, shipping its goods to customers in nearby states by truck.

Drivers of some of the trucks were arrested in Arkansas for having failed to obtain a permit required by Arkansas statute of all contract carriers. This was an action in the courts of Arkansas to enjoin respondents from further molestation or prosecution of the drivers. Some of the trucks were driven by the owners. Petitioner claimed that it had leased the trucks and that the drivers were its employees, and that therefore the drivers were "private" carriers, exempt under the statute. It was also contended that the requirement of permits was an undue burden on interstate commerce, in violation of the Constitution and an invasion of a field of regulation pre-empted by the Congress in the Federal Motor Carrier Act.

The trial court found for the petitioner and granted an injunction. The Arkansas Supreme Court reviewed the facts for itself and reversed, finding that the truck-lease arrangements were shams, and that petitioner was a shipper and not a carrier. It dismissed the bill and denied a rehearing, thereby rejecting the federal questions raised.

The Supreme Court on certiorari affirmed on the ground that the state statute was a reasonable exercise of the state's power to control its highways. Mr. Justice BLACK, who spoke for the Court, refused an invitation to set aside the state supreme court's findings of fact saying that there were no exceptional circumstances that would justify such a rejection. On the issue of undue burden on interstate commerce, the Court said that Arkansas had not refused to grant a permit for the interstate carriage of goods on her highways, and that the state commission expressly disclaimed any "discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce". The opinion noted that "The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency . . ." and that there was no showing of any attempt to attach any burdensome conditions to the grant of a permit or to interfere in any way with the National Motor Carrier Act.

In a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice BURTON and Mr. Justice MINTON joined, Mr. Justice DOUGLAS enumerated the requirements of the Arkansas statute which he declared showed that the statute was a "regulation of interstate commerce, not a regulation of the use of Arkansas' highways".

The case was argued by Glenn M. Elliott for petitioner, and by John R. Thompson and Eugene R. Warrent for the respondents.

CONSTITUTIONAL LAW

New York Statute Intended To Regulate Control of Russian Orthodox Church Held To Violate Freedom of Religion

■ *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 97 L. ed. (Advance p. 95), 73 S. Ct. 143, 21 U. S. Law Week 4029. (No. 3, decided November 22, 1952.)

This was a suit to determine the right to use and occupy the St. Nicholas Cathedral of the Russian Orthodox Church in New York City.

Appellants claimed the right for Benjamin Fedchenkoff, appointed Archbishop of North America in 1934 by the Patriarch of the Russian Orthodox Church in Moscow. Appellees were followers of Leonty, the Metropolitan of All America and Canada and Archbishop of New York, who had been elected to his office by a general convention (sobor) of the Russian Orthodox churches in America. The right to use and occupy the cathedral turned on the question whether the appointment by the Patriarch or the election by the convention validly selected the ruling hierarchy of the American churches. The New York Court of Appeals, reversing a lower court, held that the prelate appointed by the Moscow ecclesiastical authorities was not entitled to the cathedral. The court relied upon Article 5-C of the Religious Corporations Law of New York, a statute passed by the New York legislature in 1945 to bring all the New York Russian Orthodox churches into an administratively autonomous metropolitan district to which all the churches formerly administratively subject to the Moscow synod and patriarchate should be governed. Appellants contended that this statute was a violation of the Fourteenth Amendment.

Speaking for the Supreme Court, Mr. Justice REED reversed the New York court, holding that the statute was invalid under the constitutional prohibition against interference with the exercise of religion. The opinion traces the history of the Russion Orthodox Church in detail, showing how the American diocese tended to acquire a large amount of autonomy after the Communist seizure of power in Russia and the subsequent suppression of religious worship in Russia. The Court examined the organization of the Russian Church and concluded that ". . . the Russian Orthodox Church was, until the Russian Revolution, an hierarchical church with unquestioned paramount jurisdiction in the governing body in Russia over the American Metropolitanate. Nothing indicates that either the Sacred Synod or the succeeding Patriarch relinquished that authority or recognized the automomy of the American church." From this, the Court determined that, in undertaking to transfer control of the New York churches from the central governing hierarchy at Moscow, the New York legislature had overstepped the constitutional bounds of separation of church and state, and that the statute "directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy".

Mr. Justice FRANKFURTER wrote a concurring opinion in which Mr. Justice BLACK and Mr. Justice DOUGLAS joined. The opinion stressed the importance of the cathedral as the see of the Russian Orthodox faith, and viewed the judicial settlement of the dispute as strictly subordinate to the ecclesiastical law of the church, calling it "merely one aspect of the duty of courts to enforce the rights of members in an association, temporal or religious, according to the laws of that association". The opinion declared that the legislature was without the power it sought here because it had no duty to settle such disputes.

Mr. Justice JACKSON wrote a dissenting opinion. He expressed his inability to see any infringement of religious freedom in the statute, arguing that New York had merely amended its religious corporations law. There was no requirement of incorporation, he pointed out, and no attempt to interfere in any way with the affairs of the church, except that religious organizations seeking the advantages of corporate existence had to comply with the corporations statutes. He declared that the New York courts had merely determined that appellants could not have a particular church, which, under state law, belonged to another.

The case was argued by Philip Adler for appellants, and by Ralph Montgomery Arkush for appellee.

CONSTITUTIONAL LAW

Oklahoma "Loyalty Oath" Held To Violate Due Process

■ *Wieman* v. *Updegraff*, 344 U. S. 183, 97 L. ed. (Advance p. 162), 73 S. Ct. 215, 21 U. S. Law Week 4057. (No. 14, decided December 15, 1952.)

In this case the Supreme Court held that an Oklahoma statute requiring all state officers and employees to take a so-called "non-Communist" oath was unconstitutional. The statute required the officer or employee to forswear membership in any party or organization "that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means" and further to disavow any connection with "The Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization".

Appellants were members of the faculty and staff of Oklahoma A. and M. who failed to take the oath within the thirty days allowed. Updegraff, as a citizen and taxpayer, thereupon brought this suit in an Oklahoma court to enjoin the necessary state officials from paying further compensation to the appellants.

The trial court upheld the Act over contentions that it was a bill of attainder, an *ex post facto* law, impaired the obligations of appellants' employment contracts and violated the due process clause of the Fourteenth Amendment. The trial court granted the injunction, and its decision was affirmed by the state supreme court.

Mr. Justice CLARK reversed for the Supreme Court of the United States. The opinion distinguishes this case from *Garner* v. *Board of Public Works*, 341 U. S. 716, 95 L. ed. 1317, 71 S. Ct. 909 (1951), *Adler* v. *Board of Education*, 342 U. S. 485, 96 L. ed. 517, 72 S. Ct. 380 (1952), and *Gerende* v. *Board of Supervisors*, 341 U. S. 56, 95 L. ed. 745, 71 S. Ct. 565 (1951), all of which upheld oaths similar to the one struck down here.

The Court pointed out that in each of the above cases, the statute had either expressly or impliedly limited the oath so as to require only a forswearing of connection with an organization known by the affiant to be subversive. The Oklahoma Supreme Court in the case under review had refused to extend to appellants an opportunity to take the oath with that construction attached and had denied a petition for rehearing in which it was urged that failure to permit appellants to take the oath as interpreted deprived them of due process. The Supreme Court held this to be a determination by the state court that knowledge was not a factor under the Oklahoma statute, despite the fact that membership in a proclaimed organization might be innocent, or that the group itself might have been innocent at the time an affiant joined. The Court said that under the Oklahoma statute ". . . the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

Mr. Justice JACKSON, not having heard the argument, took no part in the consideration or decision of the case.

Mr. Justice BURTON concurred in the result.

Mr. Justice BLACK and Mr. Justice FRANKFURTER each wrote concurring opinions in both of which Mr. Justice DOUGLAS joined. Both concurring opinions expressed complete agreement with the Court's opinion and were written to give emphasis to particular aspects of the problem of loyalty oaths.

The case was argued by Don Emery for appellants and by Paul W. Updegraff and Fred Hansen for appellees.

EMINENT DOMAIN

Fifth Amendment Does Not Require Government To Make Just Compensation for Property Destroyed by the Army To Prevent Its Military Use by the Enemy

■ *United States* v. *Caltex (Philippines), Inc.*, 344 U. S. 149, 97 L. ed. (Advance p. 140), 73 S. Ct. 200, 21 U. S. Law Week 4052. (No. 16, decided December 8, 1952.)

Respondent oil companies owned terminal facilities in Manila at the time of the Japanese attack. The Army seized the terminal facilities, removed stores of petroleum that could be used by troops in the field, and destroyed remaining stocks of petroleum and vital parts of the plants so as to render them useless to the invading enemy. After the war, the Government paid for the petroleum stocks and the transportation equipment which were either used or destroyed by the Army, but it refused to compensate for the destruction of the terminal facilities. Respondents brought suit in the Court of Claims, claiming a right to just compensation under the Fifth Amendment. The Court of Claims allowed recovery.

The Supreme Court reversed on certiorari in an opinion written by the CHIEF JUSTICE. The opinion relied upon *United States* v. *Pacific Railroad Company*, 120 U. S. 227, 30 L. ed. 634, 7 S. Ct. 490 (1887), where the Court had said: "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss."

The Court pointed out that the property had not been appropriated for subsequent use, but had been destroyed to deprive the enemy of a valuable logistic weapon: "The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. . . ."

Mr. Justice DOUGLAS wrote a short dissent in which Mr. Justice BLACK joined. This opinion expressed the view that the guiding principle should be that "Whenever the government determines that one person's property— whatever it may be— is essential to the war effort and appropriates it for the common good, the public purse rather than the individual should bear the loss."

The case was argued by Holmes Baldridge for the United States, and by Albert R. Connelly for respondents.

EVIDENCE

Evidence Obtained by Illegal Wiretapping Is Admissible in State Courts, Despite Fact that Introduction of the Evidence Was Itself a Violation of Federal Law

■ *Schwartz* v. *Texas*, 344 U. S. 199, 97 L. ed. (Advance p. 157), 73 S. Ct. 232, 21 U. S. Law Week 4055. (No. 41, decided December 15, 1952.)

Petitioner was convicted in a Texas court of being an accomplice to the crime of robbery. Part of the evidence at his trial consisted of recordings of a telephone conversation between petitioner and another accomplice, made without the knowledge or consent of the petitioner. The conviction was upheld by the Court of Criminal Appeals of the state.

On certiorari before the Supreme Court, it was urged that Section 605 of the Federal Communications Act rendered the intercepted telephone conversation inadmissible as evidence. The pertinent portion of Section 605 reads: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted com-

munication to any person. . . ."

The Supreme Court affirmed the conviction in an opinion delivered by Mr. Justice MINTON, which held that Section 605 does not bar use of intercepted telephone communications as evidence in criminal proceedings in state courts. The opinion pointed out that, under the doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1659, evidence obtained by a state officer by means which constitute violations of the Fourth Amendment's guarantee against unlawful search and seizure is admissible in state courts.

While the problem here was somewhat different, since introduction of the intercepted communication at the trial was itself a violation of the statute, the Court was unwilling to read into Section 605 a congressional intent to bar use of such communications as evidence in state courts, assuming that Congress had power to impose a rule of evidence on the states.

It was noted that Mr. Justice BLACK concurred in the result.

Mr. Justice FRANKFURTER wrote an opinion concurring in the result. In his view, a Texas statute which renders inadmissible evidence obtained in violation of any provision "of the Constitution of the United States" might mean that the Texas court was bound to follow the holding of the Supreme Court in *On Lee* v. *United States*, 343 U. S. 747, 96 L. ed. 1270, 72 S. Ct. 967, which would have required reversal of the conviction.

Mr. Justice DOUGLAS wrote an opinion dissenting on the ground that the wire tapping was a search in violation of the Fourth Amendment and that evidence obtained by it should be excluded.

The case was argued by Maury Hughes for petitioner, and by Henry Wade and Calvin B. Garwood, Jr., *pro hac vice* by special leave of Court, for respondent.

FOOD, DRUG AND COSMETIC ACT

Provision of Food, Drug, and Cosmetic Act Prohibiting Factory Owner's Refusal To Permit Inspection Held To Be Too Vague and Indefinite To Be Sustained

■ *United States* v. *Cardiff*, 344 U. S. 174, 97 L. ed. (Advance p. 132), 73 S. Ct. 189, 21 U. S. Law Week 4045. (No. 27, decided December 8, 1952.)

The question in this case turned on the proper construction of two sections of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. §331 (f). Section 301 (f) of the Act prohibits "The refusal to permit entry or inspection as authorized by section 704". Section 704 authorizes federal officers or employees "after first making request and obtaining permission of the owner, operator, or custodian" of a plant or factory "to enter" and "to inspect" the establishment, equipment, materials and the like "at reasonable times". Cardiff was president of a corporation that processes apples for shipment in interstate commerce. He refused to give federal agents permission to enter and inspect his factory. He was convicted and fined for violation of Section 301 (f). The Court of Appeals reversed, holding that the two sections read together prohibited a refusal to permit entry only if such permission had been previously granted.

Speaking for the Supreme Court, Mr. Justice DOUGLAS affirmed on the ground that the statutory language was too vague and indefinite to give "fair and effective notice" of what constituted the criminal act. The Court acknowledged the validity of the argument of the Department of Justice that factory inspection was the primary investigative device and the only effective method of enforcing the Act, but it was pointed out that "Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour" and that both interpretations of the lower courts created uncertainties.

Mr. Justice JACKSON concurred in the result.

Mr. Justice BURTON dissented without opinion.

The case was argued by James L. Morrisson for petitioner, and by John Lichty for respondent.

INDIANS

Interest in Land Allotted to Indian Is Not Exempt from State Taxes When Devised to Non-Indian

■ *Bailess* v. *Paukune*, 344 U. S. 171, 97 L. ed. (Advance p. 130), 73 S. Ct. 198, 21 U. S. Law Week 4045. (No. 242, decided December 8, 1952.)

A trust patent to land in Oklahoma was issued to Paukune, an Apache Indian, in 1901. He died testate in 1919, leaving an undivided one-third interest to his wife, Juana, and an undivided two-thirds interest to his son, Jose. The trust period of twenty-five years was extended from time to time so that the United States still held the land in trust.

This case arose when Juana's undivided one-third interest was assessed for *ad valorem* taxes in the amount of $21.33 and was advertised for sale for failure to pay. She instituted suit in an Oklahoma court to enjoin the sale and any further levy on the ground that, under the Indian Allotment Act, the land was exempt from state taxation. Petitioners answered, alleging that Juana was a non-Indian and therefore not exempt from taxes. The trial court held her interest to be nontaxable and the Supreme Court of Oklahoma affirmed.

The Supreme Court reversed, Mr. Justice DOUGLAS, speaking for a unanimous Court. His opinion cited *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U. S. 432, 60 L. ed. 1080, 36 S. Ct. 644, as controlling: "The Court held that the policy of that Act did not embrace persons who were not Indians, since the Congress sought to protect only those toward whom it owed the duties of a guardian". The Court reversed and remanded with directions.

The case was submitted by R. L. Lawrence and R. F. Barry for petitioners, and by Reford Bond for respondent.

Courts, Departments and Agencies

George Rossman • EDITOR-IN-CHARGE **Richard B. Allen** • ASSISTANT

Administrative Law . . . substantial evidence test.

■ John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit, has discussed the troublesome substantial evidence test as applied to administrative agency determinations, in a case wherein an employer sought to overturn an order of the NLRB.

Both the Labor-Management Relations Act (29 U.S.C.A. §160(e)) and the Administrative Procedure Act (5 U.S.C.A. §1009(e)) provide that findings of the NLRB on questions of fact shall be conclusive "if supported by substantial evidence on the record considered as a whole", to use the language of the former. Use of the word "substantial" and the provision for consideration of the record as a whole represent amendment of similar provisions of the former Wagner Act.

Judge Parker declared that in the present state of the law the function of the reviewing court "is limited to determining upon the record, considered as a whole, whether the findings of the Board are supported by substantial evidence, i. e. by evidence which presents a substantial basis for the findings". He said that the provision requiring consideration of the record as a whole did not provide for review of the facts, but simply meant that isolated portions of the record could not be relied upon in blindness to other portions providing contradiction. Nor can the court's function be analogous to review in equity or in law of a case heard without a jury, where the court is given power to review the facts, for in review of an order of an administrative agency the court's power "is limited to setting aside the findings of the agency if not supported by substantial evidence".

Judge Parker said that the standard for determining substantiality of evidence in administrative agency cases could be compared to the standard used by courts in determining the sufficiency of evidence to support a verdict when the verdict is challenged by a motion for judgment notwithstanding, or to the standard used in appraising evidence where there is a motion for a directed verdict. And, he concluded, there is nothing in the Supreme Court's opinion in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 456, to the contrary.

In a separate concurring opinion, Judge Soper said that the significance of the Supreme Court's interpretation in the *Universal Camera* case of the Labor-Management Relations Act and the Administrative Procedure Act provisions for review should not be overlooked. His conclusion is that the case directs courts to assume more responsibility for the reasonableness and fairness of NLRB decisions and that it overrules prior cases in five circuits, including the Fourth. Disagreeing with Judge Parker, he declared: "Indeed it is difficult to draw the line between the function of an appellate court in passing upon the decision of a trial judge sitting without a jury in an action at law or in a suit in equity, on the one hand, and the function of the court in reviewing the decision of an administrative tribunal on the other."

(*NLRB* v. *Southland Manufacturing Company*, C.A.4th, December 31, 1952, Parker, C.J.)

Aeronautical Law . . . power of municipality to prohibit low flights by ordinance . . . supremacy of federal government in air law and regulation.

■ Spurred by a series of accidents in which aircraft had crashed into populated areas near airports, the Village of Cedarhurst, lying near the New York International Airport (Idlewild) in Queens, enacted an ordinance prohibiting aircraft from flying over the village at altitudes of less than 1,000 feet. The approach to one of Idlewild's major runways is directly over Cedarhurst and the optimum approach altitude prescribed by the federal Administrator of Civil Aeronautics and the Civil Aeronautics Board requires a descent to 518 feet at the edge of the municipality. Ten airlines, certain pilots, the Port of New York Authority (lessee of Idlewild) and the Administrator and the CAB as intervenors sought a declaratory judgment and an injunction restraining the village and its officials from enforcing the ordinance. The trial court found the ordinance conflicted with congressional legislation, held that enforcement of the ordinance threatened plaintiffs with irreparable injury and granted the injunction *pendente lite*. The defendants appealed, contending that there was no substantial doubt as to validity of the ordinance and that the federal court lacked jurisdiction until plaintiffs had exhausted their state remedies.

The Court of Appeals for the Second Circuit, with opinion by Judge Clark, affirmed the continuance of the injunction *pendente lite* but reserved final decision pending trial below on questions of trespass and nuisance raised by individual property owners who filed answers after grant of the injunction and

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week

themselves prayed for an injunction.

Appreciating the "importance of the interests involved and the potentially far-reaching effects" of the case, Judge Clark first recognized the duty of the Administrator and the CAB under the Civil Aeronautics Act to issue air traffic rules requiring certain approach altitudes and that the exercise of this power could not be continued if the ordinance is valid. The dispute, he asserted, "is clearly a very real one and not easily to be settled".

The Court commented upon the defendant's principal reliance, *U.S. v. Causby*, 328 U.S. 256, in which the Supreme Court held that property owners have a right to be free of the menace of air travel at levels near the ground and found the United States liable in the Court of Claims for compensation to property owners over whose property military aircraft repeatedly flew at low levels. Judge Clark found that the *Causby* case and the instant proceeding presented diverging factual situations until the entry into this case of property owners. Plaintiffs had contended any interference with property rights must be vindicated otherwise than by the village's interfering by ordinance with federal control and regulation of air commerce.

Summing up, the Court stated that at this preliminary stage there was sufficient question of validity of the ordinance as against the supremacy of national power to continue the injunction pending trial and possible establishment by property owners of their claims of trespass and nuisance.

On the defendants' point of exhaustion of state remedies, the Court said that this was "somewhat of a misnomer" for a principle whereby federal courts allow state courts to make a prior determination of the meaning and validity of state law or local enactment, but that where, as here, such course is neither necessary nor helpful and where the issue is essentially federal, the federal tribunal proceeds at once. And since there was no question of the power of the village to enact the ordinance under its police powers and there was no question as to interpretation of the ordinance, there was no need for postponement for state action.

(All American Airways, et al. v. Village of Cedarhurst, et al., C.A. 2d, January 7, 1953, Clark, J.)

Appeal and Error . . . challenge to conviction on grounds not preserved at trial.

■ Julius Rosenberg, his wife, Ethel, and Morton Sobell were convicted by a jury of conspiracy to violate the Espionage Act (18 U.S.C.A. §794) and were sentenced on April 5, 1951. Their convictions were affirmed by the Court of Appeals for the Second Circuit (195 F. 2d 583; 38 A.B.A.J. 408, May, 1952) and the Supreme Court denied petitions for certiorari and for rehearing (344 U.S. 838, 850, 889; 73 S.Ct. 20, 66, 134). They then filed a petition under 28 U.S.C.A. §2255, which is a federal statutory proceeding analogous to an application for a writ of habeas corpus and is thus not a substitute for appeal or a means of obtaining a retrial. Under the procedure of this section, upon hearing, the court makes findings of fact and conclusions of law "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". In this case Judge Ryan, after hearing oral argument, ruled that there was a conclusive showing of no grounds for relief, and denied the petition.

In an opinion by Chief Judge Swan, the Court of Appeals for the Second Circuit affirmed. The Court pointed out first that since Judge Ryan had heard no testimony it was necessary to treat as true all facts stated in the petitioners' motion, affidavits and exhibits, if they were indeed facts rather than "conclusionary allegations". With the case in that focus, Judge Swan then considered the various allegations which the prisoners contended were sufficient for their release.

First was the matter of alleged prejudicial newspaper publicity, both before and during the trial. In disposing of this segment of the petition Judge Swan pointed out that counsel for the prisoners had moved neither for a change of venue nor for a continuance—the two well-recognized methods of raising the question of prejudicial publicity—and upon the *voir dire* had questioned prospective jurors concerning publicity, but had not used all his peremptory challenges. It was not alleged that any juror was in fact prejudiced by the publicity.

Secondly, it was alleged that the prosecution knowingly used perjured testimony, but upon examining the allegations Judge Swan agreed with Judge Ryan that there was no factual basis for inferring that the testimony complained of was false, but rather that it was a question of credibility within the province of the jury to decide.

Finally, the argument that one of the items of information which the prisoners were charged with giving to Russia was so generally known that its transmission could not qualify as espionage under the act was decided adversely to the petitioners.

(U.S. v. Rosenberg, et al., C.A.2d, December 31, 1952, Swan, C. J.)

[NOTE: In this case death sentences were imposed upon the Rosenbergs and execution was scheduled for January 14, 1953. A stay of execution to enable them to file a petition with the President for executive clemency and for time for the President to act was granted January 5, 1953, by Judge Irving R. Kaufman, of the District Court for the Southern District of New York. On January 10, 1953, the plea for executive clemency was filed in the Office of Pardons of the Department of Justice. On February 11, the President denied the plea for executive clemency, and on February 16, Judge Kaufman set the execution for the week of March 9.]

Conflict of Laws . . . currency control laws of Czechoslovakia.

■ In an action on a contract which was made in Czechoslovakia by persons who were citizens and residents of that country and which was intended by them to be performed

there, the Court of Appeals of New York has ruled that the laws of Czechoslovakia (which forbade a resident of that country to make any payment in currency or in foreign exchange to a nonresident unless the payment was licensed by the Czechoslovakian currency control authority) could not be said to violate New York's or the United States' public policy since the United States and Czechoslovakia are both members of the International Monetary Fund established by the Bretton Woods Agreement Act (22 U.S.C.A. §286).

(Perutz v. *Bohemian Discount Bank,* N.Y.C.A., January 9, 1953, Loughran, C.J.)

Corporations . . . mergers . . . to what value are minority stockholders of merged corporation entitled?

■ In an important case decided under Delaware law, the Supreme Court of Delaware has held that where there is a merger between two corporations, one owning five sixths of the other, the minority stockholders of the subsidiary or constituent corporation are not entitled to receive securities equal in value to the liquidating value of their stock, but are entitled to receive stock relatively equal in net asset value to the stock they own in the merged corporation, since, in general, a merger effects an exchange of shares of stock in a going concern for shares in another going concern. The minority stockholding group had vigorously contended that the merger was essentially a sale of the assets of the constituent corporation to the dominant corporation and that, under the merger plan, the stock they were to receive had a considerably lower market value than the liquidating value of their present stock. The Court carefully distinguished between asset value and market value and between a merger and a sale, and said that in the case of a merger the stockholder of the merged corporation is entitled to receive securities substantially equal in value to those he held before the merger, whereas in the case of a sale he receives nothing directly but his corporation is entitled to receive the value of the assets sold.

In another facet of the case the Court decided that a Delaware statutory provision allowing corporations by by-law to provide that interlocking or interested directors may be counted toward a quorum was not repugnant to the common law of that state.

(Sterling v. *Mayflower Hotel Corporation, et al.,* Sup. Ct. Del., November 18, 1952, Southerland, C.J.)

Criminal Law . . . power of court to correct erroneous sentences.

■ In sentencing two defendants the trial court confused identities and erroneously sentenced the one convicted of the greater number of offenses to the lighter sentence. Within fifteen minutes and before the defendants had left the building, they were returned and resentenced by the judge in accordance with his original intention.

The Court of Appeals for the District of Columbia Circuit ruled against the aggrieved defendant's contention that he had already begun to serve his first sentence by commitment to a "place of detention" within the meaning of 18 U.S.C.A. §3568. Remarking that Congress did not intend to make a jail of the courtroom and its entrances and exits, the Court said the prisoner had not been transferred to executive custody and the trial court could recall him to pronounce corrected sentence. The Court also held that there was no error in the fact that the second sentence was imposed in the absence of counsel, who had apparently left quite satisfied with the first sentence.

(Walton v. *U.S.,* C.A.D.C., January 15, 1953, Clark, J.)

Criminal Law . . . "digger machines" as gambling devices per se.

■ The United States seized twenty-four "digger machines" that had been transported in interstate commerce on the ground that they were gambling devices within the meaning of 15 U.S.C.A. §1171, which, in part, defines a gambling device as a machine which delivers money or property "as the result of the application of an element of chance". The machines were rectangular, partially glass-enclosed boxes containing a small overhead crane suspended on a swivel arrangement which the player manipulated with a crank in order to direct the crane to pick up items of varying value placed on the floor of the box. The owner of the machines intervened and during the trial, with no jury, demonstrated operation of the machines and showed that by skillful manipulation the crane could be induced to swing and thus pick up the more valuable items. The court found the machines were not gambling devices under the statute and ordered their return to the intervenor.

The Court of Appeals for the Eighth Circuit reversed and ordered forfeiture of the machines. The Court said that, granting there was some element of skill and control in operation of the machines, there was a "substantial element of chance" involved, and that it was improper, in view of the wording of the statute, to weigh whether chance or skill predominated.

(U.S. v. *24 Digger Merchandising Machines, etc.,* C.A.8th, January 6, 1953, Woodbrough, J.)

Estates . . . descent and distribution . . . determination of heirship.

■ The Supreme Court of Pennsylvania has wound up the troublesome and complicated matter of determination of the heirship of Henrietta E. Garrett, who died November 16, 1930, leaving an intestate residuary estate of more than $17,000,000. There were 26,000 claimants as next of kin; a master and examiners appointed by the Orphans' Court held some 2,000 hearings and took testimony of more than 1,100 witnesses; the record totalled 390 volumes containing in all over 115,000 pages; and the master filed a 900-page report which included 2,077 findings of fact and thirty-six conclusions of law. The master found the decedent left three first cousins who were entitled to the estate. The Orphans' Court adopted

the master's report and a schedule of distribution was filed in January, 1952. The several appeals taken therefrom were consolidated.

The Supreme Court of Pennsylvania affirmed, dismissing several of the claims to relationship as fantastic, as had the master, and finding that the master had followed correct procedure in hearing claimants when he denied them access to the Garrett genealogical table until some probity in their claim had been shown. The Court observed: "The findings of the master adopted by the Court satisfied everyone except 26,000 disappointed claimants. It is therefore not surprising to find, twenty-two years after the death of Henrietta E. Garrett, that some persons still sincerely believe that they are entitled to her estate as next of kin and cannot understand how any court can fail to recognize their close relationship to their dear and treasured Henrietta whom they never saw or knew but of whom they have recently become so fond." The Court further said that considering the passage of time the burden of proving a claim now "must in fairness and justice be a heavy one for, unlike Tennyson's brook, the Garrett estate cannot go on forever".

(In re Estate of Garrett, Sup.Ct. Pa.E.Dist., January 5, 1953.)

Evidence . . . suppression and return of property under unlawful search and seizure provision of Federal Rules of Criminal Procedure.

▪ Two cases have recently been decided by the Court of Appeals for the District of Columbia Circuit involving Rule 41 (e) of the Federal Rules of Criminal Procedure, which provides that a person aggrieved by an unlawful search and seizure may ask for return of the property seized and suppression of it as evidence where it is obtained under a warrant when "there was not probable cause for believing the existence of the grounds on which the warrant was issued".

In the *Scoggins* case the Court held that the defendant could not invoke Rule 41 (e) since his standing to challenge thereunder must be based upon a claim of possession of the property or seizure of it from his premises, and the defendant had denied both.

In the *Washington* case the defendant properly invoked the Rule by claiming possession of the premises searched, but the Court ruled that where a police officer made several calls to the telephone number of premises from which he believed a numbers game was being run and received sensible answers to purely technical numbers-game type questions, there existed sufficient "probable cause" to sustain issuance of the warrant. The Court remarked that probable cause under the Rule does not mean legal evidence to convict.

(Scoggins v. *U.S.* and *Washington* v. *U.S.,* C.A.D.C., January 15, 1953, Bazelon, J.)

Indictment and Information . . . sufficiency of indictment to charge nonfeasance in office.

▪ Herman N. Bundesen, President of the Board of Health of Chicago, was indicted on a seven-count indictment drawn under an Illinois statute subjecting a municipal officer to indictment when "guilty of palpable omission of duty". The Criminal Court of Cook County quashed the indictment and the State brought error as to three of the counts.

The Appellate Court of Illinois for the First District affirmed, holding: (1) that the count charging the defendant with failing to ascertain the truth or falsity of an FBI report to him that 160,000 pounds of horse meat had been slaughtered and shipped into Chicago was insufficient because the statute did not impose such an obligation upon the defendant and because the FBI report was not particular as to time, place and persons engaged in horse meat dealing; (2) that the count charging the defendant with failing to take disciplinary action against subordinates when he received reports of their improper conduct was insufficient because from mere report or rumor it did not follow that subordinates were actually engaged in improper conduct; and (3) that the count charging defendant with failing to use an "effective effort" to halt horse meat sales in Chicago was insufficient because it failed to allege that the defendant had knowledge of any persons, times or places where such sales were made.

(People v. *Bundesen,* App.Ct.Ill. 1st Dist., December 9, 1952, rehearing denied December 25, 1952, Tuohy, J. 109 N.E.2d 385.)

Military Law . . . pardon and amnesty granted certain persons by presidential executive orders.

▪ By two recent executive orders the President has (1) granted full pardon to any person convicted of violation of any law of the United States (except laws for the government of the Armed Forces) prior to his service in the Armed Forces who, after June 25, 1950, serves in an active status in the Armed Forces for at least a year and is honorably discharged or separated; and (2) granted amnesty and pardon to any person heretofore or hereafter convicted by court martial for desertion from the Armed Forces on or after August 14, 1945, and prior to June 25, 1950, so as to fully remit to those persons any loss or forfeiture of their citizenship, capacities or nationality.

(Proclamations 3000 and 3001, F.R.Docs. 52-13780 and 52-13779, *Federal Register,* December 31, 1952.)

Municipal Corporations . . . reasonableness of time for city to clear sidewalks of record-breaking snowfall.

▪ The New York Appellate Division, First Department, has ruled that the City of New York could not reasonably have been expected to have cleared all roadways and sidewalks within ninety hours after the record snowfall of 25.8 inches (plus 2.67 inches of other precipitation) which fell on December 26, 1947, and has therefore reversed a plaintiff's judgment obtained in the Supreme Court.

(*Rapoport* v. *City of New York*, N.Y.App.Div. 1st Dept., December 16, 1952, Per Curiam.)

Negligence . . . liability of U. S. under Tort Claims Act to child trespasser under New Jersey law.

■ Plaintiff sued the United States under the Federal Tort Claims Act (28 U.S.C.A. §§2671-2680) for an injury to a child trespasser who fell from a tower erected with permission by the Coast Guard on land owned by the Borough of Avalon, New Jersey. The tower had been abandoned since 1946 and the trial court found open and notorious use of it by children, particularly during the summer months, since it was easily accessible from an adjacent beach boardwalk. New Jersey law controlled and since the "attractive nuisance" doctrine has been rejected in that state, the trial court gave judgment for the defendant, but did assess damages.

The Court of Appeals for the Third Circuit reversed and remanded with directions to enter a judgment for the plaintiff.

Writing for the Court, Judge Goodrich noted that prior to *Strang* v. *South Jersey Broadcasting Co.*, 9 N.J. 38, 86 A. 2d 777, decided in March, 1952, plaintiff could not have recovered. In the *Strang* case, however, the New Jersey Supreme Court upheld a judgment for a minor plaintiff who was injured by falling into a fire which the defendant's agent had built on defendant's land. Judge Goodrich pointed out, moreover, that the *Strang* case cannot be distinguished from the instant case on the ground that in the former there was the creation of an active and dangerous force, whereas in the present case there was nothing more than failure to keep the premises in repair. Recovery was not put upon such narrow ground in the *Strang* case, in his opinion, and he concluded that New Jersey has adopted the view of §339 of the Restatement of Torts that where trespasses by children are foreseeable, the condition involves an unreasonable risk which children cannot realize or appreciate and the utility of the condition is slight compared to the risk, there is liability. This basis of liability, Judge Goodrich remarked, is entirely unrelated to the "attractive nuisance" doctrine, which he termed "a catch phrase that has made all sorts of difficulty and explained nothing".

(*McGill, et al.* v. *U.S.*, C.A.3d, January 7, 1953, Goodrich, J.)

Prisons and Prisoners . . . authority of penitentiary officials to superintend correspondence of prisoners.

■ A prisoner at the federal penitentiary at Leavenworth, acting *pro se*, sought an injunction against the Attorney General, alleging that the prison administration would not allow transmission of letters he had written to the daughter of the superintendent of another prison and that the prison officials had placed in his personnel file a damaging letter purportedly written by the daughter but which he claimed was written by her father for the purpose of disparaging his chances for pardon or parole.

Affirming dismissal of the action on the ground that the complaint failed to state a cause of action, the Court of Appeals for the District of Columbia Circuit held that stoppage of the inmate's letters fell within the wide powers of control in such matters given prison administrations and that the courts have no power to superintend discipline in a federal penitentiary through the injunctive process. As to the allegedly spurious letter, the Court said that if the prisoner was actually damaged his remedy was in tort for libel and that under such circumstances as presented by this case the courts have no inherent power of disposition over documentary data and records of the executive branch of the government.

(*Dayton* v. *McGranery*, C.A.D.C., January 15, 1953, Prettyman, J.)

Further Proceedings in Cases Reported in This Division

■ The following action has been taken in the United States Supreme Court:

CERTIORARI DENIED, January 5, 1953: *U.S.* v. *Price*—Army and Navy (37 A.B.A.J. 925; December, 1951).

CERTIORARI DENIED, January 19, 1953: *Air Transport Associates, Inc.* v. *CAB*—Administrative Law (38 A.B.A.J. 857; October, 1952).

CERTIORARI DENIED, January 19, 1953: *Drown* v. *U.S.*—Federal Food, Drug and Cosmetic Act (38 A.B.A.J. 1033; December, 1952).

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ In the following article, Professor Larson explains the importance of social legislation and suggests means by which a study of the subject can be introduced into the law school curriculum. Professor Larson is the author of a recent text on workmen's compensation and during the past year spent several months in England where he engaged in a study of the British social security system.

Social Legislation and the Law Schools

by Arthur Larson
Professor of Law, Cornell University

■ "The . . . . Act has put more money into the pockets of lawyers than any other piece of legislation."[1]

The same Act has produced judicial interpretations which take up more space in the latest Decennial Digest[2] than all other topics except two—more, for example, than corporations, insurance, or internal revenue.

Yet this Act (the Workmen's Compensation Act) is still ignored by most law schools. A check of the catalogues of one hundred and eighteen law schools shows the following:

Sixteen offer a separate course in workmen's compensation.

Thirteen offer a course in "Social Legislation", "Employees' Rights", "Welfare Law", or "Labor Law II", which covers workmen's compensation, unemployment compensation, social security, disability insurance and, in addition perhaps wages and hours, public assistance and housing legislation.

Twenty catalogues indicate that workmen's compensation or other branches of social legislation are treated incidentally in other courses: seven in agency, six in labor law, five in torts, and three in administrative law.[3] Questionnaire surveys have shown that incidental reference is made in some additional schools, but the extent of such reference is not enough to disturb the general conclusions to be drawn from the analysis of the catalogues.

Of the 118, then, twenty-nine make workmen's compensation and social legislation a major item for attention, an additional nineteen treat them incidentally, and the remaining seventy do not consider them important enough to be mentioned in the catalogue.

Two questions will be considered here: first, why should law schools teach this kind of legislation, and second, how should they teach it?

As to the first: The reasons differ somewhat between workmen's compensation, on the one hand, and the remaining items of social legislation, on the other. Workmen's compensation should be taught simply because it is a major field of modern law practice. Claimants and insurance carriers need and are entitled to trained lawyers. Any client, for that matter, is entitled to expect of his lawyer a sufficient familiarity with compensation law to enable him to recognize and deal with the potential impact of the Compensation Act on various accidents in which the client may be involved either as a claimant or defendant, perhaps in connection with a third-party suit arising out of an industrial injury, or with an estate problem involving an industrial death.

As to social legislation generally, the reasons for inclusion in the curriculum are perhaps less "practical" but no less valid. Unemployment compensation is indeed becoming a rather important item in legal practice, but it will never rival workmen's compensation in this respect because the benefits at stake in any single claim are apt to be too low to impel the claimant to seek legal counsel; and there is nothing, of course, corresponding to the compensation insurance Bar. Apart from claims procedure, however, there is a substantial amount of legal work in determining liability in the first instance for contributions or payroll taxes under unemployment and old age statutes, a kind of practice that is frequently handled by tax lawyers. And generally, of course, anyone called upon to advise an employer must be prepared to answer questions relating to social insurance statutes, wages-and-hours legislation, and the like.

But the principal reasons for teaching social legislation are broader. The most fundamental reason is that social insurance is this country's proving-ground on which it may well be determined whether we are going to do things in a socialistic way or within the framework of the private enterprise system. There is little disagreement on the objective; almost everyone now recognizes the desirability of some kind of legislation protecting the breadwinner and his family against the consequences of wage loss due to physical disability, economic unemployment and old age. But there is profound disagreement on methods of attaining the objective. Now, in the last analysis it is usually lawyers who have the responsibility for the method; that is, they draft the legislation, and design the administrative and financial machinery. It is imperative that in doing so they understand the implications of the different available social insurance systems. One example may help to highlight this point. A recent news letter stated that the bulk of congressional mail on social security favors direct federal pensions financed by taxation.

1. Jayetileke, J., in *Rahim v. Elisahamy*, 44 New Ceylon Reports 485 (1943).
2. 3,452 pages. The two larger entries are criminal law, and appeal and error.
3. There is one duplication within this group, and one duplication between this and the first group.

This might to the casual reader look like an insignificant morsel of news, but its implications are staggering. The change, if adopted, would convert social security in this country from an insurance-type protection to a socialistic government-hand-out type of plan.

Another manifestation of the lawyer's responsibility in this field is the task of co-ordinating the maze of federal, state, union, employer and private insurance plans all operating in the field of insurance against wage loss—a problem which is assuming alarming proportions, and will eventually call for the highest legal skill if utter confusion is to be averted.

Still another legislative challenge to the lawyer is that of simplifying and co-ordinating the workmen's compensation statutes of the various states. A conference on a Uniform Compensation Act was once held—in 1910. Is it preposterous to suggest that it might be time to start thinking about another? The freedom of each state to go its own way in the last forty years has been highly valuable in producing experimentation with different kinds of provision. Perhaps it is now time to select the best end results of this experimentation and try to give every state the benefit of them. Of course, uniformity of dollar benefits is out of the question, because of differences in living costs among the states. On the other hand, the acts are in their most important sections closer to uniformity than most people realize; all but a very few have the same coverage formula and employee concept—two areas which account for the greater part of compensation litigation. If nothing else, a start should be made by getting uniform provisions installed on extraterritoriality and third party actions, where the need for uniformity is most acute.

Whether or not, then, the amount of conventional legal practice under a particular statute is large or small, the modern law school graduate ought to be thoroughly grounded in social legislation, so that at whatever point he touches it, whether as practitioner, administrator, legislator, judge, or adviser to employer, employee or union, he may do so with credit to his profession and with benefit to the society in which this legislation now plays so large a part. Experience teaches us that if the legal profession hangs back in acknowledging a field of this kind as its own, others will move in to fill the gap and the lawyers will be excluded. If in Britain workmen's compensation had been given status by the Bar and the universities as a respectable and recognized legal subject, and if a generation of lawyers had been produced who so viewed it, would that generation of lawyers have stood by while both legal representation and judicial review in the entire area of social insurance were almost completely abolished?

The second question is: How can workmen's compensation and social legislation be effectively taught? The failure to include these subjects in the curriculum has been due in some instances not to any lack of appreciation of their importance but to an uncertainty whether they are amenable to classroom treatment. Specifically, the case method of instruction is felt to present various difficulties not encountered in more conventional subjects. Much of compensation law is a mosaic made up of thousands of very small pieces contributed by individual cases, no one of which is in itself very enlightening. The pattern of the mosaic cannot be discerned by reading the number of cases which time allows in such a course. A considerable part of New York's compensation law, for example, lies in the hundreds of opinions of the Third Department and Court of Appeals published in memorandum form. Another difficulty is statutory variation from state to state; for the cases are meaningless unless constantly checked against the statute which they interpret.

At Cornell, the problem method is used. An attempt is made to simulate the conditions of an actual law office, with the teacher in the role of senior partner, calling in the student as one of the juniors in the office to brief a problem that has just been brought in by a client. Problems are drawn from actual cases, or sometimes they may be invented. Each student prepares an interoffice memorandum (or such other paper as the problem calls for) of a degree of thoroughness in research and perfection in style that would pass in the most exacting office. A week or two, or occasionlly even more, may be allowed for this. At the class meeting, the memoranda are discussed, and, in the process, the teacher has an opportunity to see to it that the students become familiar with the entire branch of the subject on which the problem touches. At the same time, to ensure that the student gets a systematic and not fragmentary picture of the subject, parallel reading in a standard treatise is assigned. The final memoranda are carefully corrected for style, grammar, briefing technique, and presentation. The kind of paper prepared is not necessarily a brief or memorandum; for example, at the moment the group is struggling with the task of drafting a model third-party-action statute and a model conflict-of-laws provision.

Originally, the greatest obstacle to the use of the case method was the lack of a casebook; that lack has been remedied, with the appearance of Riesenfeld and Maxwell's book entitled *Modern Social Legislation*, which contains, in addition to leading cases, a wealth of background, statutory, and note material over the entire range of social and welfare legislation. Although there is more in the book than can be covered in the time that any school is apt to allot, a selection can be made to suit the requirements and curriculum of the particular school.

If the school is not prepared to make this subject a separate item in the curriculum, it should at least ensure that it receives attention in connection with some other subject. This leads to the question: with which subject should it be combined? The answer is: either agency

or labor law. There are several reasons for the tie with agency. The logical connection is this: the study of relational rights between master and servant necessarily includes the duties of the master toward the servant in respect to physical injury growing out of the relation. A practical reason for the combination is that the bulk of both vicarious liability and workmen's compensation litigation hinges on course-of-employment and employee-versus-independent-contractor problems. The two can be treated together, with a saving in time, and with an opportunity to account for the contrasts between them. Here again there is at hand a casebook specifically designed for this type of course, Conard's *Cases on Agency and Employment Relations*, which includes, in addition to workmen's compensation, a considerable range of other social legislation. A final advantage of combining with agency is that it is usually a required course, and this ensures that every student will acquire at least an elementary acquaintance with social legislation; for this reason, the agency combination is used at Cornell in addition to the separate elective course for advanced students.

When social legislation is combined with labor law, the logical connection is this: labor law may be conceived of as embracing, in addition to the usual content of organizational relations involving unions, collective bargaining and the like, the rights of the individual laborer vis-à-vis his own union, his employer and the state. Since the traditional material to be covered in labor law is already extensive and constantly growing, this addition of "employee rights" probably necessitates either a lengthened or a separate course. Teaching materials designed for this kind of course are available in the form of a compilation of *Cases and Materials on Labor Law*, produced by a group of teachers of labor law, with Professor Robert E. Mathews as Editor-in-Charge.

There are, then, several ways in which workmen's compensation and other social legislation can be taught. There are, however, two ways in which they should not be taught.

First, workmen's compensation should not be combined with torts. If it is so combined, almost inevitably the impression will be created that it is just another strict-liability tort. This misconception is responsible for more errors both judicial and legislative than any other,[4] and obscures the inherent relation of workmen's compensation to other social legislation giving protection against wage loss, a connection which must be grasped if modern legislation is to have any coherence at all.

Second, workmen's compensation should not be taught on the basis of a single state's statute and decisions. It may be argued that, if the school's graduates expect to practice largely under the one statute, it is enough for them to know that statute and that state's cases. To this there are two answers. The first is that, whatever some lawyers may think, compensation law cannot be practiced in any state on the strength of that state's decisions alone. Of course, if the state's case law completely covers a particular point, there may not be occasion to look further; but the thing about compensation law that constantly impresses the practitioner is its capacity for producing an infinite variety of novel questions. The decisions of any one state, large or small, will cover only a fraction of that variety. When the local state, then, supplies no case directly in point, a lawyer who fails to go on and find an existing out-of-state case or line of cases arising under a similar statute and exactly covering his facts has done justice neither to himself nor to his client. The second reason for not confining study to one state is that the student or lawyer must learn how his own state compares with the other forty-seven both as to legislative provisions and as to interpretations. If his state has a 1913 case holding one way, and the other forty-seven have cases holding the other, should he not know this? Compensation precedents are notoriously impermanent, and trends in other states will often permit a prediction on when it is worth while to attempt to upset a local decision. As to legislative provisions, the argument is even stronger. Every session of the legislature produces a flood of compensation amendments; and students and lawyers of each state should be aware of the improvements, experiments, successes and failures of other states. As to social legislation generally, for similar reasons, legislative developments and experiments in the British Empire and on the Continent are of great interest, if for no other reason than that we can and should profit by their mistakes.

In conclusion, it may be mentioned that the crusade to get workmen's compensation and social legislation taught in law schools is meeting with some success. Most of the schools listed as teaching these subjects have introduced them during the past few years; every new set of catalogues shows additions to the group. During the same few years, there have appeared, to aid in the process, a standard treatise on workmen's compensation, a casebook on social legislation, an agency-employment casebook, and a labor-law-employees'-rights casebook. There seems to be no reason why these subjects should not in the foreseeable future become a recognized part of the standard law school curriculum.

4. For a more complete development of this point, see Larson, *Workmen's Compensation Law*, Volume I, pages 4-12.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

United Nations Policy on Subversive Employees

■ Newspaper headlines in recent months have focused popular attention on the position of American employees of the United Nations who have been charged with having engaged in subversive activities against the United States or with having had Communist sympathies or affiliations. Inquiries conducted in New York by a federal grand jury and by a subcommittee of the Senate Judiciary Committee have received wide publicity. Charges and countercharges have been freely bandied about, sometimes with little restraint, and a number of U.N. officials have resigned or been dismissed from their positions.

The furor in the press has tended to obscure the issues involved and to lead to misunderstanding by many persons of the position of the U.N. and its relationship to the United States, which is the "host country" for the U.N.'s Headquarters. Hence it may be useful to review the situation, without becoming involved in personalities, and to describe the studies which have resulted in new policies on the subject for both the U.N. and the United States.

The events which most influenced later developments appear to have occurred at hearings conducted by the Senate subcommittee in New York between October 13 and November 12, 1952. At these hearings twenty U.N. employees and two former employees were called upon to testify in public session. Others were heard in executive session, the records of which have not been made public.

The twenty-two witnesses were questioned chiefly about espionage and subversive activities and about past or present membership in the Communist Party or in organizations declared to be subversive. Sixteen declined, on grounds of possible self-incrimination, to answer one or more questions put to them; in one instance, the refusal was also predicated on instructions from the Secretary-General that U.N. employees were "not authorized to testify with regard to official activities of the United Nations".

The problem posed by these refusals was obviously a difficult and delicate one. On the one hand there was the legitimate United States' interest in assuring its own internal security and in seeing to it that there should not be on American soil a center where its own nationals could work with impunity against it. On the other hand there was the important need to preserve the independence and integrity of the U.N. Secretariat, composed necessarily of persons of all shades of political belief from all parts of the world.

There was also the further consideration that if persons were to be dismissed because they were not in favor with the Government of their native State, a two-edged precedent might be established. Persons familiar with the situation could recall that, after the establishment of the Communist regime in Czechoslovakia, the U.N. did not fail to continue the employment of certain Czech nationals who were not in sympathy with the views of the new masters of Prague.

Faced with the problem of framing a U.N. personnel policy that would take due account of the interests of both sides, the Secretary-General on October 23 announced that he would obtain the advice of a commission of jurists specially appointed by him for this purpose. The commission was composed of William D. Mitchell, former Attorney-General of the United States; Sir Edwin Herbert of the United Kingdom, a London solicitor with a long record of public service; and Professor Paul Veldekens of Belgium, Professor of Law in the University of Louvain. It met for the first time on November 14, and submitted its report on November 29. On December 4 the Secretary-General, in a memorandum to his staff, announced his intention to use the commission's conclusions and recommendations as the basis of his personnel policy. In view of this adoption, the commission's report merits careful examination.[1]

The Secretary-General had submitted to the commission five questions with respect to U.N. staff members of United States nationality. The commission, however, did not deal directly with these, but preferred to follow its own approach to the problem. It noted incidentally that it had found it impracticable to deal with the position of United States nationals exclusively without taking into account the position of staff members of other nationalities but residing in the United States.

After reviewing the events that had led up to its appointment, the commission observed that on one side American public opinion had been gravely disturbed by the suspicions that had been aroused regarding certain U.N. personnel; and on the other, the morale of the U.N. staff had been seriously affected by charges which were regarded as reflecting on the staff generally. Such a situation, the commission declared, imperiled the relationship between the U.N. and the United States on which the smooth functioning of the U.N. depended. The essential question was thus how to preserve this relationship with proper respect on both sides.

The commission prefaced its consideration of specific problems with some general observations. In these it emphasized that U.N. employment, with its accompanying privi-

1. The texts of the commission's report and of the Secretary-General's memorandum are in U.N. Document A/INF/51, 5 December 1952. Corrigenda appear in Document A/INF/51/Corr. 1, 12 December 1952.

leges and immunities, could in no way abrogate or qualify the loyalty owed by a staff member to his own country. Under Articles 100 and 101 of the Charter the sole responsibility of the Secretary-General for the staff should not be interfered with by any member state, including a host country; but the Secretary-General should refrain from hiring or retaining any persons who might be engaged in subversive activities against a host country. The Secretary-General should also promote, as already indicated in the existing Staff Regulations, a sense of responsibility to the U.N. in the staff; this would include abstention by every officer from active political work and a standard of private conduct which would be acceptable to law-abiding citizens in the country in which any officer was employed.

Turning from these rather general pronouncements against sin, the commission proceeded to consider three categories of specific situations:

(1) Where a U.N. officer has been convicted of a crime involving an element of disloyalty to the host country;
(2) Where a U.N. officer invokes a privilege against self-incrimination;
(3) Where the Secretary-General has reasonable grounds for believing an officer to be engaging or to have engaged in subversive activities.

While these situations were considered with particular reference to the United States, where the situation was most acute, the commission made it clear that in forming its views it had taken into account the possible occurrence of similar situations in other states in which U.N. personnel might be stationed.

With respect to the first category, the commission concluded that

> the Secretary-General should regard the conviction as an absolute bar to the employment or the continuation of employment of the officer concerned in the State in question. We can conceive of cases in which the matter could be dealt with by a transfer to the staff working in another country. That solution is evidently of very limited application so far as the Headquarters staff of the United Nations working in the United States of America [is concerned], and in most cases dismissal would be the only course open to the Secretary-General.

Furthermore, there should be no distinction in result between United States citizens and others:

> A resident in the United States, whether a United States citizen or not, is entitled to claim the protection of United States law and is under the correlative obligation to observe the United States laws, including the laws relating to internal security. Under the arrangements made for the recruitment of staff of the United Nations it is inevitable and, in our belief, wholly desirable, that employment should be available, whether in the Headquarters Organization in the United States or elsewhere to citizens of countries who have adopted a communist regime. Loyalty to their own countries may require that these persons should hold communist views and even be active members of the Communist Party in their own country. The presence of such persons in the interests of the continued operation of the United Nations will, we believe, be accepted by the good sense of the American people who are the citizens of the host State. If they are to be accepted as guests, however, they must accept, in our opinion, the obligations of guests and refrain from activities regarded as subversive by the law of the host country.

With respect to the second category of situations, where a claim of privilege against self-incrimination is made, the commission made the following observations:

> In our opinion, a person who invokes this privilege can only lawfully do so in circumstances where the privilege exists. If in reliance upon this privilege a person refuses to answer a question, he is only justified in doing so if he believes or is advised that in answering he would become a witness against himself. . . . It follows from this, in our opinion, that a person claiming this privilege cannot thereafter be heard to say that his answer if it had been given would not have been self-incriminatory. He is in the dilemma that either his answer would have been self-incriminatory or if not he has invoked his constitutional privilege without just cause. As, in our opinion, he cannot be heard to allege the latter, he must by claiming privilege be held to have admitted the former. . . . The privilege is an absolute right and it is legal in the United States to assert it, but it does not follow that a witness claiming the privilege, whether he be a national of the United States or otherwise, suffers no ill consequences by the mere fact of his asserting the privilege. . . . It appears to us, therefore, that in cases where this privilege is involved in the United States, the Secretary-General must take notice of the fact and be prepared to take the appropriate action.

The commission then considered whether any distinction should be drawn between refusals to answer questions regarding espionage or subversive activities and refusals to answer questions regarding membership in the Communist Party or in some organization declared to be subversive. It had no doubt that in the first case the person would be "just as unsuitable for continued employment by the United Nations in the United States as one who had actually been convicted," regardless of whether the acts involved were done before or after he entered U.N. employment. In the second case it arrived at the same conclusion with greater hesitation. If the Secretary-General accepted its advice, the commission warned, he should make clear in future to all staff members the possible consequences on their employment of any plea of privilege.

In its third category of situations, those where there might be suspicion of subversive activities without any conviction or plea of privilege appearing, the commission emphasized that there were uncertainties not present in the first two groups. The difficulty of evaluating adverse allegations or inconclusive information was pointed out, and the commission confessed that it could only offer

> the very general advice that if the Secretary-General is satisfied that he has reasonable ground for believing that a member of the staff is engaging or is likely to engage in activities regarded as subversive by the host country, he should come to the conclusion that the officer concerned should no longer be employed in that country. Membership of a body declared subversive is not a crime but does in our view suggest that the law of the United States of America regards a member as a potentially unreliable citizen. No such person should be employed by the United Nations without special enquiry. Such a con-

clusion should only be come to however after a proper opportunity has been given to the officer concerned to state his case.

The Commission expressed the view that a mere statement by a member state that a person belonged to an organization deemed subversive should not be grounds for dismissal, since this would amount to an instruction to the Secretary-General contrary to Article 100 of the Charter. Nevertheless, such a statement should put the Secretary-General on inquiry, and if possible the accusing state should put its derogatory information at his disposal. If the Secretary-General should decide in favor of the employee in a case where the state has not made its evidence available, it should not be open to that state, the commission said, to criticize his decision.

Later parts of the commission's report went on to deal with the question of establishing procedures within the U.N. to apply the recommended policies. The commission felt that the decision in any case of subversive activity must be taken by the Secretary-General, but that he should have the assistance of an advisory panel in certain cases, to be composed of two senior staff members and an independent chairman. It further concluded, after reviewing the situation, that the Secretary-General appeared to have adequate powers to deal with such cases without amendment of the existing Staff Regulations.

As noted above, the commission's conclusions and recommendations have been formally adopted by the Secretary-General. This action represented a departure from the Secretary-General's prior position, in which he had taken a more limited view of his powers to deal with problems of this kind among U.N. staff members. The views expressed by the commission have also proved acceptable to the Department of State, which advised the President in December that "the report established a comprehensive and satisfactory basis for assuring that only loyal Americans are employed on the United Nations Secretariat".[2]

In view of the revised policy of the Secretary-General, steps were taken during December for the issuance of an Executive Order by the President providing for the screening by the United States nationals employed by the U.N. Information disclosed by this screening, which is similar in nature to that followed in the federal loyalty program, will be referred in appropriate cases to the Secretary-General for action.

2. Department of State Press Release No. 931, December 30, 1952.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ADMINISTRATIVE LAW—*"The Administrative Law of Federal Hearing Examiner Personnel"*: This two-part article by Simon Tucker, in the October and December issues of the *George Washington Law Review* (Vol. 21—Nos. 1 and 2; pages 38-60, 198-240), analyzes the legal requirements of Section 11 of the Administrative Procedure Act as to the application of personnel administration processes to federal hearing examiners. The article depicts the intent of Congress to be that of conferring on examiners not substantive rights to a personnel status of independence, but rather rights to have personnel processes applied so as to give them internal independence from agency pressure while remaining as employees of their agencies. As to the substantive personnel processes, the article finds that, in employment, position classification, case assignment, and reduction-in-force, the regulations issued by the Civil Service Commission covering hearing examiners properly guard their internal independence within the framework of congressional intent not to set the examiners up as a separate body of judges. The article asserts that the recent successful attack on these regulations in *Federal Trial Examiners Conference* v. *Ramspeck* (38 A.B.A.J. 863; October, 1952), soon to be reviewed by the Supreme Court, was not procedurally ripe for judicial review, because it was an attack upon regulations themselves rather than upon their application in particular situations adversely affecting specific rights of individuals. (Address: George Washington Law Review, 720 20th Street, N. W., Washington 6, D. C.; price for a single copy: $1.00.)

ANTITRUST LAW: By far the most important development is the Report to the Secretary of Commerce, Charles Sawyer, by the Business Advisory Council entitled "Effective Competition", dated November 14, 1952. Summarizing the Committee's summary: (1) Antitrust needs improvement in policy, interpretation and administration (a masterful understatement?); (2) Antitrust statutes and decisions are inconsistent (exaggeration?); (3) Businessmen are uncertain (a 1912 campaign issue?); (4) Sherman Act is "hard competition" *(Socony-Vacuum,* even reasonable regulation is bad?); (5) Robinson-Patman requires "soft competition" (no quantity discount for a large order from A. & P.?); (6) Antitrust laws are inconsistent (Fair Trade, Robinson-Patman and Sherman are not the same?); (7) The Rule of Reason was right (Taft v. T. R. and W. W.?); (8) The Rule of

Reason is flexible (reason is hard?); (9) Shall we have absolute or flexible control? (no thinking?); (10) Revitalize the Rule of Reason (do work?); (11) "Perfect competition" is too abstract (no more TNEC?); (12) Have "effective competition" with "safeguards" (What is it?); (13) and (14) "Effective competition" is "socially desirable" and solves "monopoly and bigness": (can we depend on it?); (15) Terms like "monopoly and bigness" have "lost virtually all clarity of meaning" (yes and no?); (16) Monopoly is a "single seller" (who?); (17) "Bigness is a relative concept" (and what isn't?); (18) "Effective competition" balances large and small business (how?); (19) Procedural techniques are bad (antitrust cases are not a long disease like leprosy and Medina may live to sit on the Second Circuit?); (a) Substitute a Conference section in Justice (be efficient and prompt?); (b) Authoritative rulings as an adjunct to the Conference section will help business (shades of the 1912 campaign and the Commerce Court?); (c) A review board composed of "competent businessmen, engineers, economists, and nonprosecuting lawyers" should "try to insure that government commencement of antitrust cases conforms to national policy" (What, no chiropractor?). I assume everyone can obtain this valuable and important report, as I did, by writing to the Secretary of Commerce at Washington, D. C.

Although Commissioner Spingarn, of the FTC, does not like William Simon's doing it, the second most important development is the organization of the new Antitrust Section of the American Bar Association. It met at San Francisco at the Annual Meeting, September 17, 18, 1952. The chairman is Edward R. Johnston, 11 South LaSalle Street, Chicago. Its proceedings have been published in a bright blue pamphlet, the handsomest thing you have ever seen. In addition, addresses are published by George B. Haddock, of the Department of Justice, on "The Sherman Act and Big Business"; John T. Cahill, of New York, on "Must We Brand American Business by Indictment as Criminal?"; Edward H. Levi, Dean of the University of Chicago Law School, on "The Robinson-Patman Act—Is It in the Public Interest?", and James E. O'Brien, of San Francisco, Robert W. Austin, of the Harvard School of Business, and Joseph E. Sheehy, of the Federal Trade Commission, on the same topic. There follows in the pamphlet a report of the question and answer session, an address by Chief Judge Leon R. Yankwich, of the Southern District of California, entitled "Competition Real or Soft—or What Have You?", the by-laws and roster of members of the Section. Every lawyer doing antitrust work should make it his business to get this pamphlet. It is of comparable value to the excellent similar pamphlets published by the Antitrust Section of the New York State Bar Association, sold through Commerce Clearing House. Copies of the proceedings are available to members of the Antitrust Section for $1.50; Commerce Clearing House at 522 Fifth Avenue, New York City, will supply the New York bar pamphlet at $3.00 each per year.

Attention is called to a *Columbia Law Review* note on the dismissal of a treble-damage suit brought as a stockholders' derivative suit. The court, the note-writer says, thought "the merger was only procedural", the derivative suit "an equitable device" and "the treble damage suit a legal remedy". The case noted is *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, C. C. H. 1952 Trade Reg. Rep., Par. 67, 295 (S.D.N.Y. 1952). "Successful enforcement of the anti-trust laws seems to require recognition of this weapon under the fair procedure made possible by the new Federal Rules", says this Columbia law student or his professor. One wonders. *Columbia Law Review*, Vol. 52—No. 8; pages 1069-1071. (Address Columbia Law Review, Kent Hall, Columbia University, New York, 27, N. Y.; price for a single copy: $1.25.)

CONSTITUTIONAL LAW—*"Free Speech 1949-1952: Slogans* v. *States' Rights"*: This article by Henry M. Kittleson and J. Allen Smith in the fall issue of the *University of Florida Law Review* (Vol. V—No. 3; pages 227-260) presents an able discussion of the seventeen free speech cases decided during the last three terms of the United States Supreme Court. The authors make excellent use of a series of tables in analyzing these cases and in presenting conclusions as to the effect of these decisions on this area of the law. (Address: Florida Law Review, Gainesville, Fla.; price for a single copy: $1.00.)

COMPARATIVE LAW—"Jurisdiction over Crimes Committed Abroad: French and American Law": This article by Georges R. Delaume, in the December issue of the *George Washington Law Review* (Vol. 21—No. 2; pages 173-196) points out the evident lack of international collaboration in establishing criminal jurisdiction over crimes involving international elements in a world evolving towards the achievement of an international community. Limiting the scope of inquiry only to those cases where the crime is located outside the territory of the state claiming jurisdiction, the author discusses the variances of American and French law, with regard to territorial and extraterritorial factors, under the subjects of legislative jurisdiction and criminal court jurisdiction. (Address: George Washington Law Review, 720 20th Street, N. W., Washington 6, D. C.; price for a single copy: $1.00.)

DOMESTIC RELATIONS: The January, 1953, issue of the *Michigan Law Review* (Vol. 51—No. 3; pages 345-374) contains an interesting and informative article entitled, "Interstate Recognition of Custody Decrees; Law and Reason v. The Restatement". The author of this valuable study, Professor Albert A.

Ehrenzweig of the University of California School of Law, has made an exhaustive analysis of the existing case law on this subject with particular reference to the *Restatement* formula which requires enforcement of foreign custody decrees except where there is an absence of foreign jurisdiction or where there has been a change of circumstances. The author criticizes this view as being too rigid in some respects and too flexible in others. On the other hand, he considers a rule of unlimited discretion to be objectionable as well. The writer considers the primary principle in this field to be that the court's discretion should be governed exclusively by the child's welfare. In this respect the conduct of the parents becomes a material consideration and regard should be had for the "clean hands" of the benefiting parent. The ultimate solution, in Professor Ehrenzweig's view, will be found in full co-operation among the courts of all states and this will require legislative action to establish "extralitigious proceedings" which will be sufficiently adaptable to achieve the desired close harmony. The Uniform Support of Dependents Act, now in force in ten states, is an important step in this direction. (Address: Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan; Price for a single copy: $1.50)

FEDERAL PRACTICE: Maintaining its high standard of excellence and continuing its interest in federal procedure, the *Virginia Law Review* published a valuable piece in its December, 1952, issue (Vol. 38—No. 8; pages 985-1010) by Edwin Conrad, of Madison, Wisconsin, entitled "Let's Weigh Rule 43a". This is the evidence rule of the Federal Rules of Civil Procedure. Mr. Conrad tells us that Rule 26 of the Criminal Rules lets the federal court in criminal cases use federal law under *Swift* v. *Tyson* as all federal prosecutions are under federal statutes. In civil cases the federal courts use an *Erie* v. *Tompkins* version, Rule 43 (a). Mr. Conrad says "rules of evidence . . . are not affected" by *Erie* (page 991). Would that this were true! But nevertheless the article is very well done and what is more important, it will be of inestimable value to those of us who try cases in federal courts. Study of Rule 43 (a) is long overdue and Mr. Conrad's contribution will be of great value to the profession. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.25.)

FUTURE INTERESTS—Vol. 30, No. 3, of the *Chicago-Kent Law Review*, for June, 1952, contains a forty-six page article dealing with constructional and other factors relating to class gifts, about which much has been written but seldom in this form. Professor Elliot G. Robbins, recognizing that courts have been singularly unsuccessful in resolving the sundry issues native in what might be considered a relatively simple limitation on property distribution, attempts to bring clarity and light out of chaos. In that regard, he treats critically with existing definitions of class gifts, puts emphasis on the factors to which courts might turn for support in achieving an interpretation of trust or testamentary language, works out the methods of distribution which might be followed, and points up the problems inherent in determining whether the interests created are vested or could lapse. More to the point, he offers suggestions to aid the draftsman in the preparation of a trust or testamentary instrument so he may avoid the necessity for securing judicial interpretation which, too frequently, results in the formulation of an estate plan never intended by the settlor or testator. Appendices to the article tabulate, under appropriate headings, all English, Canadian and American cases, from among which the lawyer should be able to find one or more decisions to support either side of an argument. (Address: Chicago-Kent Law Review, 10 N. Franklin St., Chicago 6; price for a single copy: $1.00.)

JUDICIAL REFORM—Under the title "The Proposed Illinois Judicial Article", Professor William F. Zacharias takes space in the September, 1952, issue of *Chicago-Kent Law Review* to examine, in detail, a proposal recently offered by a Joint Committee of the Illinois and Chicago Bar Associations for a noteworthy attempt to revamp the judicial department of one of the nation's largest states. While the content of the article will be of particular concern to Illinois lawyers, it should interest others both because it contains the full text of the proposal and because it delineates the possible impact thereof on an existing judicial system. Simplification and integration of the state judicial system, somewhat along lines followed in New Jersey, as well as a modification of the Missouri plan for selection of judges, are highlights in the proposal. (Address: Chicago-Kent Law Review, 10 N. Franklin St., Chicago, 6; price for a single copy: $1.00.)

LABOR LAW—"The No-Strike Clause": This article by Carl H. Fulda in the December issue of the *George Washington Law Review* (Vol. 21—No. 2; pages 127-172) is an advance publication of the 1952 Report of the Committee on Improvement of Administration of Union-Employer Contracts, Section of Labor Relations Law of the American Bar Association, which gives a very detailed, informative as well as instructional discussion of the self-imposed no-strike clause contained in collective bargaining agreements between union and management. Pointing out that these clauses appear in 85 per cent of all union-employer contracts to replace or precede action of a damage suit allowed by Section 301 of the Labor Management Relations Act, the report discusses various cases brought under this section, then discusses the influence of this section upon the no-strike clauses and ends with a discussion of the consideration and

awards accorded these clauses by arbitrators. Dispersed throughout the whole article are pertinent suggestions of contract construction to aid the lawyer who may become involved in negotiation of collective bargaining agreements. (Address: George Washington Law Review, 720 20th Street, N. W., Washington 6, D. C.; price for a single copy: $1.00.)

LETTERS OF CREDIT: *"The Dixon Irmaos Case"*—In the May, 1952, issue of the *Columbia Law Review* (Vol. 52—No. 5; pages 589-782), appears this article by two of New York's most distinguished lawyers, Dana Converse Backus and Henry Hayfield. The theme of the article is that contracts should be performed as written. The authors argue that the requirement of strict performance is an incident to freedom of contract; that in the rare cases in which a court properly excuses one party from the requirement of strict performance, the remedy should be rescission and not creation and enforcement of a new contract. Even where a contract is to be interpreted in the light of a clear custom unmistakably applicable, the custom should be used only to fill in the interstices of an agreement or to substitute for agreement with respect to matters overlooked and not expressly foreseen, and not to contradict the terms of an agreement. By way of illustration of the propositions, the authors criticize the case of *Dixon Irmaos & Cia. v. Chase National Bank*, 144 F. 2d 759 (2d Cir. 1944) which had permitted a bank indemnity to be substituted for a required document under a letter of credit. The authors discuss this decision and its relationship to commercial credit law and practice, the framework of which is analyzed in some detail. (Address: Columbia Law Review, Kent Hall, Columbia Law School, New York, 27, N. Y.; price for a single copy: $1.25.)

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ A four-page check list of the duties of an administrator under Ohio law was recently distributed with *Bar Communications*, the regular monthly publication of the Akron Bar Association. The check list is arranged in chronological order and covers the steps in administration from facts which should be ascertained and actions which should be taken immediately upon death to those involved in final distribution of the estate. Throughout the list, reference is made to the applicable statutes and forms. Because of its arrangement, which facilitates easy reference, and its comprehensive nature, the list should be useful to those Ohio lawyers who are specialists in the estates field as well as to those engaged in general practice.

■ A New Jersey State Bar Association committee, Abe D. Levenson of Union City, Chairman, and a Rutgers Law School and University faculty committee, David Stoffer, Chairman, have announced a new study of the divorce problem. The joint committee of the two organizations will consider methods of reducing the number of broken homes and in particular the possible use of a voluntary marriage counseling system or an official reconciliation service as an approach to the problem.

The membership of the bar association committee includes Robert K. Bell, of Ocean City, Robert D. Grosman and Harry W. Lindeman, of Newark, William A. Hegarty, of Budd Lake, Donald H. McLean, of Elizabeth, and William Reich, of Trenton. Indicative of the fact that the problem is not primarily a legal question, members of the committee from the University include representatives from the psychology and sociology departments as well as from the law faculty and the survey will seek advice not only from eminent legal authorities but also from clergymen, social workers, psychiatrists, parent-teacher groups and other organizations concerned with family relations.

William L. ELLIS

Chase

■ William L. Ellis of Washington D. C. was recently elected National President of The Federal Bar Association. Active in Government service since 1930, Mr. Ellis has been an officer of the Association for several years and has served on the editorial staff of the *Federal Bar Journal*. Other officers elected to serve for the 1952-53 term are Bettin Stalling, First Vice President; John F. Richter, Second Vice President; William S. Tyson, General Secretary; Ida A. Kloze, Recording Secretary; and Kennedy C. Watkins, Treasurer.

■ A ground-breaking ceremony for a new Domestic Relations Court Building was held recently at the Brooklyn Civic Center. Long advocated by the Brooklyn Bar Association, the new building will unite in the same building the borough's divisions of the Children's Court and Family Court which are part of New York City's

Domestic Relations Court.

The Honorable John Warren Hill, Presiding Justice of the Domestic Relations Court, presided over the ceremony which included as speakers John Cashmore, President of the Borough of Brooklyn, George C. Wildermuth, First Vice President of the Brooklyn Bar Association, Frank D. Schroth, Sr., Publisher of the *Brooklyn Daily Eagle,* and the Honorable Gerald Nolan, Presiding Justice of the Appellate Division of the Second Department, Supreme Court of New York.

The arrangement of facilities in the new building will provide complete separation of children's cases from those involving adults. Privacy in court hearings and in interviewing those who come to the court is emphasized in order to create an atmosphere appropriate to dealing with situations on a more personal basis than is possible in the usual court. In addition to courtrooms and justices' chambers, the building will provide space for information and probation services, temporary detention rooms, a psychiatric clinic and a playground for children.

■ Huntington Carlile is Chairman of the Television Committee of the Columbus Bar Association which produces the highly successful thirty-minute biweekly television panel, "Final Decision". A board of three lawyers, members of the Columbus Bar Association, are presented a number of actual cases on which they attempt to reach a decision within a given time limit. After the panel arrives at its own ruling, the real decision and its reasoning are revealed by means of an off-stage "Voice of Legal Authority". The cases are selected with a view toward popular appeal and run the gamut of legal experience. Public interest in the program and the subject matter presented is indicated by the reported listening audience of 50,000 in the Columbus area.

Laurens WILLIAMS

■ The fifty-third annual meeting of the Nebraska State Bar Association was held in Omaha on November 13 and 14, with a record attendance of 767. On November 12 the Association sponsored jointly with the Committee on Continuing Legal Education of the American Bar Association and the American Law Institute an institute on "Problems of Small Business Clients, Old Age and Survivors Insurance and Unemployment Compensation". Speakers on the institute program were Emmet H. Dunaway of Omaha, Merle Alden of Kansas City, Donald P. Miller of Lincoln and T. Hartley Pollock of St. Louis.

Speakers on the annual meeting program were Robert G. Storey, President of the American Bar Association and Hatton W. Sumners, of Dallas. A trial technique symposium was held on the afternoon of the second day of the meeting. Participating in the symposium were George Healey, of Lincoln, Robert P. Hobson, of Louisville, Erwin W. Roemer and Joseph H. Hinshaw, of Chicago.

Section meetings with excellent programs were held by the Sections on Real Estate and Probate Law, Insurance Law, Municipal Law, Administrative and Labor Law and by the Junior Bar Section. Alan Loth, of Ft. Dodge, was the speaker before the Real Estate Section and Kenneth Grubb, of Milwaukee, and Ted J. Fraizer, of Lincoln, at the Insurance Section. Speakers at the meeting of the Administrative Law Section were David W. Swarr, of Omaha, and John E. Sidner, of Lincoln.

Elected as officers for 1953 were President, Laurens Williams, of Omaha, Vice Presidents, Clarence T. Spier, of Omaha, John J. Wilson, of Lincoln, and R. R. Wellington, of Crawford. Clarence A. Davis, of Lincoln, and Paul E. Boslaugh, of Hastings, were re-elected to the House of Delegates of the American Bar Association.

Activities of Sections and Committees

SECTION OF ADMINISTRATIVE LAW

■ Opponents of legislation which would permit exceptions to the applicability of the provisions of the Administrative Procedure Act will undoubtedly resist the enactment of a proposal introduced in the House of Representatives on the first day of the 83d Congress. The bill, H. R. 171, submitted by Representative Rees of Kansas, would exempt the Post Office Department from the Administrative Procedure Act in the enforcement of Sections 255, 259, 259a and 732 of Title 39 of the United States Code, and Sections 1302, 1461, 1463 and 1717 of Title 18 of the Code. The decision in the *Riss* (341 U.S. 907) case left no doubt that the provisions of the Administrative Procedure Act applied to Post Office Department enforcement proceedings. The progress of the proposal will be watched with interest by members of the Section.

Also of interest is the recent decision in the Supreme Court of the United States in the case of *United States* v. *Tucker Truck Lines, Inc.*, decided on November 10, 1952 (reviewed in the February issue at page 143). According to figures furnished to the Court the decision forecloses an attack in "about five thousand cases" pending before the Interstate Commerce Commission in which no timely objection was raised. ["Reliable sources" report that no lawyers familiar with the provisions of the act and its interpretations through their membership in the Administrative Law Section have been thus frustrated.] The decision has the effect of eliminating the need for legislation such as that proposed in H. R. 5045, pending when the 82d Congress adjourned, the purpose of which was to validate proceedings upon which doubt was cast by the decision in the *Riss* case. The Section voted at the San Francisco meeting neither to favor nor oppose passage of the bill.

SECTION OF ANTITRUST LAW

■ Plans for an April meeting in Washington of the Section of Antitrust Law are shortly to be announced. A dinner on April 1 is to be followed by an all-day session on April 2. Responsible spokesmen for the Department of Justice and the Federal Trade Commission are to be invited to discuss "The Program Ahead" for their respective agencies, and leading antitrust practitioners are then to review "The Problems Ahead" for private industry. The timely subject matter of this meeting should insure a record turnout of Association members interested in keeping abreast of recent antitrust developments.

SECTION OF JUDICIAL ADMINISTRATION

■ The work of the Committee on Cooperation with Laymen, which received a gratifying impetus at the New York meeting of the American Bar Association in 1951 and at a Regional Meeting of the American Bar Association held at Louisville, Kentucky, in April of last year, was further advanced by a program at the 1952 Annual Meeting of the American Bar Association in San Francisco on September 17, 1952.

At the San Francisco meeting an overflow assembly of judges, lawyers and laymen attended Section meetings at which a series of provocative and informative questions were propounded.

Efforts are being made to bring about the establishment of State Committees on Cooperation with Laymen. Of necessity this must proceed slowly but it is believed that substantial progress will be made in this direction within the next several years.

COMMITTEE ON RETIREMENT BENEFITS FOR LAWYERS

■ The campaign to obtain legislation in 1953 in aid of retirement benefits for professional men and other self-employed individuals was formally started in this session of Congress by the introduction of bills by Congressman Jenkins, the senior Republican member of the Ways and Means Committee after the Chairman, and by Congressman Keogh. These bills are identical with the Reed-Keogh Bills introduced by Congressmen Reed and Keogh in the last session of Congress except for necessary changes in dates. The new bills received the numbers H.R. 10 and H.R. 11, respectively.

In spite of the fact that the Democratic Platform in the last campaign endorsed the principle of these bills, and that President Eisenhower issued a statement in favor of this principle, in view of the feeling of many in Congress that no legislation should be passed which in any degree might interfere with balancing the budget, it is clear that in order to persuade Congress to give these bills favorable consideration it is necessary that the members of Congress feel that the self-employed, including professional men, are vitally interested in them. Copies of the bills may be obtained by writing to Edward B. Love at the Headquarters of the Association.

In his statement President Eisenhower said:

> The Government is rightly concerned with assisting its citizens to provide savings for their old age. The Social Security Act of 1935 embodied the doctrine that society through government should provide minimum benefits for the aged. We all favor this.
>
> In 1942 the Government made an important supplement to the Social Security Act by legislation which offered tax advantages to corporations and their employees in the establishment of pension funds. I am thoroughly in accord with the principle of this legislation. Over 16,000 pension plans have been filed under this law providing more adequate security for the employees of corporations covered thereby. When this legislation was being considered, self-employed individuals were evidently forgotten. Yet they get old and sick just as other people do. There are over 10 million workers who cannot take advantage of these tax relief provisions now offered to corporations and their employees. They include owners of small businesses, doctors, lawyers, architects, accountants, farmers, artists, singers, writers—independent people of every kind and description but who are not regularly employed by a corporation. I think something ought to be done to help these people to help themselves by allowing a reasonable tax deduction for money put aside by them for their own savings. This would encourage and assist them to provide their own funds for their old age and retirement. If I am elected I will favor legislation along these lines.

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

■ The following representatives of the American Bar Association are presently members of the National Conference Groups of Lawyers and Laymen: Cuthbert S. Baldwin, New Orleans, Louisiana; Thomas J. Boodell, Chicago, Illinois; Oscar J. Brown, Syracuse, New York; A. James Casner, Cambridge, Massachusetts; Abraham N. Davis, New York City; E. N. Eisenhower, Tacoma, Washington; Clifford W. Gardner, St. Paul, Minnesota; Charles D. Hanel, Washington, D. C.; H. Cecil Kilpatrick, Washington, D. C.; J. Harry LaBrum, Philadelphia; Edward L. Lawler, Memphis, Tennessee; David F. Maxwell, Philadelphia; Edwin M. Otterbourg, New York City; James A. Poole, Chicago; John D. Randall, Cedar Rapids, Iowa, and Warren H. Resh, Madison, Wisconsin.

The National Conference of Lawyers and Certified Public Accountants, National Conference of Lawyers and Representatives of American Bankers Association—Trust Division, National Conference of Realtors and Lawyers, National Conference of Lawyers and Life Underwriters, Conference Committee on Adjusters and National Conference of Lawyers and Life Insurance Companies, all divisions of the National Conference Groups, have been formed for the purpose of seeing to it that the public receives legal service and advice from individuals trained in the law, duly licensed to practice and who are in a position to render disinterested advice and exclusive loyalty to each client. It is also an integral part of these agreements with lay groups that the lawyer will be guided by the Canons of Ethics of the American Bar Association and opinions interpreting the same.

A number of these conference groups have achieved outstanding success in amicably disposing of disputes, and the agreements which are printed in Volume II of the Martindale-Hubbell Law Directory (1951, 1952 editions) furnish every state and local bar association with the basis upon which to work out local agreements.

One of the indirect benefits to the Bar that has arisen as a result of the efforts of the lawyer members of these conferences in educating the lay members to the importance of having the public receive sound and disinterested legal advice and service is a tremendous amount of advertising by banks, trust companies, insurance companies and others calling the public's attention to the reasons why lawyers should be consulted on all legal problems.

While it is not the function of the conference groups to dictate to any bar association or lay group in any particular controversy, they nevertheless do supply a forum which is always open for those who want help, and experience has shown that such assistance may avoid costly litigation, bitter feelings and bad public relations for all concerned.

COMMITTEE ON UNEMPLOYMENT AND SOCIAL SECURITY

■ During the past year, the Standing Committee on Unemployment and Social Security has given major attention to seeking information and opinions of state and local bar associations (also of individual members of the association) with respect to coverage of self-employed lawyers under Social Security (Federal Old-age and Survivors Insurance).

The introduction in the Senate of the Lodge Bill, S. 2481, providing for the voluntary inclusion of lawyers within the Social Security Act, generated much activity. Under direction of the House, we requested the Senate Finance Committee to defer action on that Bill. For many reasons, other than our request, it did..

An analysis of the Lodge Bill (with reference to similar bills) was prepared by us, and published. Arguments for and against were set forth. Care was taken to distinguish between the voluntary coverage under the Lodge Bill and the retirement income provisions of the Reed-Keogh Bills (H.R. 4371 and 4373, now H.R. 10 and 11), which latter bills have the support of the Association. It was shown that the two were not incompatible.

In the July, 1952, issue of the JOURNAL, there appeared an array of facts and posing of questions. Our purpose was to obtain an *informed* opinion from the members of the

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OUR YOUNGER LAWYERS

C. Baxter Jones, Jr., Secretary and Editor-in-Charge, Atlanta, Georgia

by Richard H. Bowerman, Chairman, Junior Bar Conference

■ In the February issue of this column, Paul Lashly wrote of the origin and development of the Junior Bar Conference. I have been asked to write the complement to his article in the sense of addressing myself to what will or ought to be the future history of the Conference.

At the outset, it should be observed that the answer to what the Conference ought to be represents a purely subjective appraisal and that there will be as many answers as there are those to whom the question is addressed. Let me, therefore, file this caveat: If the future should prove me incorrect in my anticipation of its course, the program herein suggested will at least represent the personal objectives of the Chairman of the Conference for 1953.

In my opinion, there are few, if any, fields of endeavor in the pursuits of the organized Bar in which this association of younger lawyers can operate with respect to a national problem and with a single *modus operandi* applicable in all states of the union. Even in the field of procedural reform studies, which represents the maximum achievement of this Conference with reference to a national problem, the emphasis has been to arouse interest within state organizations to assist in conducting the necessary surveys. These surveys having been made and having resulted in the establishment of minimum judicial standards, the emphasis has been to work individually within each state, through state bar associations, toward the elimination of the most outstanding procedural evil in the judicial system found to exist in each such state.

I submit that the broad purposes of the Conference must be as follows:

(1) To assist in causing the law student and younger attorney to recognize his obligation, as a member of the Bar, to improve the system of jurisprudence, to maintain the dignity and honor of the legal profession and the integrity of the judiciary and to serve the public above and beyond the relationship of attorney-client on a fee basis.

(2) To assist him in a recognition of those aspects of practice within his own jurisdiction which are detrimental to the ideals stated above and to arouse in him a desire to co-operate with others in the elimination of those evils.

(3) To provide assistance either through existing associations or in the creation of new ones, toward a concentration of opinion in support of his objectives and to assist in the education of those associations by making available the experience which has been acquired elsewhere in the accomplishment of similar objectives.

(4) To provide a national clearing house wherein mutual problems may be discussed and recognized and beneficial experiences exchanged.

With reference to the first point, the officers of the Conference have this year been working in close co-operation with the officers of the American Law Student Association and the Director of the Law Student Program, not only to affiliate the few remaining unaffiliated schools, but, more important, to effect a close liaison and co-operation between each existing affiliated unit and the most influential bar association in the locality wherein each such school exists. Our purpose is to bring the students and local bar associations together on the state and city level in order that those students may have an opportunity to observe the practical problems of our profession and to be of assistance, even while in school, in helping the local associations to achieve whatever may be proper local objectives.

Law students, in co-operation with the local bar associations, through the encouragement of the Junior Bar Conference, are being used to assist in preparing legislation and arguments in support of legislation to carry out court reform. Students are being asked to assist younger lawyers in the preparation of bar journal articles on matters of interest to the profession and to the public generally. Students are being brought into the Legal Aid Program and are assisting our Committee on Courts of Limited Jurisdiction in the research which that committee is conducting. We are striving to provide the means of co-operation on a local level; but, having achieved that co-operation, it is our purpose to leave it to local determination to decide toward what objectives that coordinated effort ought to be directed.

It is, I believe, most desirable for us to function through a junior bar section of a state bar association. This, however, is not always feasible; and in the realm of organization, as in the realm of substantive accomplishment, the local situation will largely determine the nature of the local organization. It may be that our organization will be nothing more than a loose-knit scattering of men willing to serve as called upon or it may be a group of younger lawyers who get together periodically for luncheon or in other meetings. Whatever form the organization may take, it is our hope to encourage the frequent association of younger lawyers. Experience proves that from such association has come a recognition of common problems and a desire to do something about them. We will continue our efforts through our Committee on State and Local Activities and our Membership Committee to form local associations wherever we can.

In many states we are conducting outstanding programs in the field of continuing legal education. It will be our effort to try to interest the states wherein these programs are not now conducted to undertake them. Once an organization has acquired the habit of sponsoring such institutes, their repetition is not difficult to achieve. Similarly, where rules of discovery or of civil practice generally are archaic, we must convince the

younger lawyers of the desirability of reform; and we must, through our Committee on Procedural Reform Studies and other committees, assist those younger lawyers not only in recognizing the evils but in bringing to their attention measures which have proved successful in their elimination in other jurisdictions.

Most people have never been inside a courtroom. Their conception of the judicial process stems entirely from the distorted portrayal by the motion pictures, the television and the radio. Such contact as the great majority of those who have brushed against the law have had has been with the Traffic Court or Criminal Court. Our most majestic courtrooms, those given over to sessions of the supreme courts of the various states, are seldom visited by so much as one per cent of the population. In an effort to cure these situations, the Traffic Court Improvement Committee has two broad objectives. First, we seek to improve the standard of justice administered in traffic courts by segregating the traffic business of the court from the other criminal business which it conducts; by eliminating the ticket fix; by conducting highway safety conferences, bringing together the investigating forces of the police, the prosecuting forces and the judiciary in a recognition of common problems in meeting the traffic hazard. Second, by bringing the public into our traffic and municipal courts and there conducting, during the course of a session of court, a program of education so as to explain to the public the rights of an accused and the system of justice as it is administered in that court. This program of familiarization is conducted under the title "Go to Traffic Court as a Visitor, Not a Violator".

If our judicial system is to survive, it must be appreciated. The public must be made to know its obligations with reference to that system. It is, therefore, often an active part of the program of the Junior Bar Conference in many states to conduct classes in citizenship in the high schools and in the civic organizations; to point out to the public the obligation to serve as jurors or the obligation to act as a witness to an accident observed or to participate in government or to attend town meetings where that form of government is still privileged to exist.

The means of bringing these activities to the attention of local associations will be through a better utilization of *The Young Lawyer*, the official publication of the Conference, and by publicizing in this column successful programs being carried out in various parts of the country. Furthermore, it will be the primary responsibility of our Committee on State and Local Activities to distribute throughout the country a series of programs setting forth not only the objectives but the details of how best to organize such a program and how best to seek to carry it out.

Our Public Information Program this year will concentrate upon the establishment in Chicago of a well-catalogued library of available radio and television programs. We will circulate these upon request among the states and will institute a concrete plan for the permanent reproduction of those scripts deemed worthy of perpetuation.

I would advocate this year that if we can have succeeded at its conclusion in the creation of but a handful of new associations, we can feel that our accomplishment has been worthwhile if those associations have been well founded. If each of our committees can interest a few new states in the activities of that committee, our accomplishment will have been real.

Activities of Sections and Committees

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Association. We received some response and also a few letters from lawyers not members of the Association. Immediately before the Annual Meeting, we analyzed and tabulated all replies to our questionnaire.

We also arranged, announced and held a public meeting at the San Francisco meeting, inviting any and all members to appear before us and express their respective opinions. The few who appeared were informed and earnest.

We reported to the House at San Francisco (as stated in the advance program) that the individual members of the Committee were not in favor of the Lodge Bill and were in favor of the Reed-Keogh or similar bills.

Shortly before the adjournment of the Assembly and the House, we reported as follows: "Because of the dearth of response from the membership to our questionnaire in the advance program and the very limited attendance upon the public meeting of the Committee held in San Francisco, we move that action of the House on S. 2481 (Lodge Bill) be deferred until the February meeting of the House." This motion was carried.

No subsequent developments have changed the views and conclusions of the Committee. This is in accord with the prior policy position of the Association.

A more complete report will be on file with the Secretary.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Net Worth Method of Computing Income — Burden of Proof

▫ The use of the so-called "net worth-expenditures" method of determining income and of other indirect means has increased tremendously during the past few years. In the six months from June to November, 1952, 115 Tax Court decisions relating to the income taxes of individual taxpayers were reported, and thirty-six of these involved the issue of the amount of money received by the taxpayer (as distinguished from legal or accounting questions as to the tax treatment to be given specific items of receipts or expense). In determining the amount of receipts in these thirty-six cases, the Commissioner used the "net worth-expenditures" method in sixteen, the "analysis of bank deposits" method in five, the "percentage of mark-up" method in three, and in four cases the method used was not shown in the decision. In only eight cases was the unreported income shown to be based on specific proof of unrecorded income transactions. And in current investigations (which will not reach the stage of judicial decision until two to four years or more from now), the Bureau attempts to apply the net worth method in almost all fraud cases, and in a very high percentage of nonfraud cases as well. In addition, a bank deposit analysis is almost routine.

It has become increasingly important, therefore, for lawyers to understand the basic legal and accounting principles upon which these methods rest, the conditions under which they may be used, and the manner in which they can be applied.

The net worth formula. The "net worth-expenditures" formula can be stated in these terms: Increase in net worth, plus nondeductible disbursements, minus nontaxable receipts, equals taxable net income. It is basic to this proposition that a man's expenditures and acquisitions in any year (which can be demonstrated) must derive from what he had at the beginning plus what he receives during the year; after the nontaxable income has been eliminated or negatived, the balance of the receipts must constitute taxable net income.

Four main questions. There are four principal categories of legal questions in a net worth case. Although the burden of proof will vary according to whether the case is a civil or a criminal one, and the quantum of evidence sufficient to carry the burden will depend to a considerable extent on the circumstances of each case, the legal problems will remain essentially the same. They are: (1) the adequacy of the taxpayer's records and method of accounting, (2) the determination of the net worth at the beginning and end of each year, (3) the computation of deductible disbursements, and (4) the elimination of nontaxable receipts.

Adequacy of taxpayer's records. The Government's right to use the net worth method (or any other indirect means of computing income, for that matter) is not based on any *specific* authorization in the Internal Revenue Code or the Treasury Regulations. Rather, it is derived from Section 41 of the Code which broadly provides that, if the method of accounting employed by the taxpayer in keeping his books does not clearly reflect his income (or if he has no books), the Commissioner may employ such method as in his opinion does clearly reflect the taxpayer's income.

The first legal question, therefore, is whether the taxpayer's books can be discredited sufficiently to warrant the use of some other method. In criminal cases, the Government must produce some substantial evidence showing the books to be inadequate or incorrect. Even in a civil case, where the Commissioner's determination is presumed to be correct, the Tax Court has on occasion refused to apply the net worth method when all the evidence supports the accuracy of the books. See, *e.g.*, *Murray Glackman*, 10 T.C.M. 1132 (1951).

When it appears that the taxpayer's method of accounting does not accurately reflect his income, the Commissioner may then choose another method which does clearly reflect his income. Use by the Commissioner or the Government of the net worth method under these circumstances has been often sanctioned by the courts in proper cases. See, *e.g.*, *United States* v. *Johnson*, 319 U. S. 503 (1943).

The beginning net worth. In practice, the toughest problem is establishing the taxpayer's net worth at the beginning (and sometimes at the end) of the period. The issue usually arises several years after the fact, when memories are faulty and unreliable. Since taxpayers are not required to keep records on a net worth basis, and rarely do so, it is difficult to reconstruct all assets and liabilities as of December 31 in each of several prior years. To the extent that assets or liabilities appear in public records, the information is, of course, available. But business records (even of banks) are often destroyed after several years, and many asset and liability transactions (such as personal loans, or cash accumulations in safe deposit boxes, or gifts from relatives) are never recorded. Yet these matters are often of crucial importance in a net worth case. The placing of the burden of proof, there-

fore, takes on great significance. In some criminal cases the courts have held that, because a net worth case is based on circumstantial evidence, the Government must prove that it has taken all of the defendant's assets and liabilities into account in order to make a *prima facie* case. *Bryan* v. *United States*, 175 F. 2d 223 (5th Cir. 1949); *United States* v. *Fenwick*, 177 F. 2d 488 (7th Cir. 1949).

Frequently the Government finds the necessary proof in the taxpayer's statements to the agents during the investigation, or in financial statements given to banks or credit agencies at or near the pertinent dates. In the absence of such evidence, the Government may find it impossible to sustain its burden of proof. Recognizing this difficulty, the Court of Appeals for the Fourth Circuit has been lenient with the Government in affirming convictions where the proof that the Government's computations were correct consisted largely of inferences to be drawn from the fact that an "explanation" advanced by the taxpayer to contradict the Government's contention had been discredited. See, *e.g.*, *Jelaza* v. *United States*, 179 F. 2d 202 (4th Cir. 1950); *Bell* v. *United States*, 185 F. 2d 302 (4th Cir. 1950).

It remains to be seen just what the courts will do with a case in which the taxpayer asserts his constitutional privilege not to talk (thereby precluding the drawing of any inferences based on his silence), or with a case where the Government's claim that its net worth statement is complete rests *entirely* on the fact that it has listed all the assets and liabilities which it found in a comprehensive search, without any support from statements of the defendant.

The taxpayer sometimes claims that some of his acquisitions during the pertinent years were purchased with currency which he had in a safe deposit box, office safe, or at home at the start of the period. Such a claim is hard to prove by independent evidence, yet in some cases people do accumulate large sums of currency in private repositories. To cite a few recent well-publicized examples, $200,000 was found in the suitcase of a man who died in his $25 per month New York apartment; $175,000 was stolen from the home of a Pennsylvania widow; $32,000 was taken by a Chicago teen-ager from its "cigar box" hiding place in his aunt's skid-row rooming house; the $40,000 life savings of an Arizona couple were accidentally burned in some old clothing; a deranged California clergyman bilked a fruitstand operator out of $26,000 hoarded in a cookie tin; and several hundred thousand in currency was taken from the residence of a wealthy Nevada man. In any of these cases, had the accumulated money been invested in visible assets in later years, the taxpayer would have been hard-pressed to prove that this money represented a prior accumulation, and the Bureau would be inclined to treat it as current income in the years in which it became "visible". Whether the taxpayer goes to jail or not in these situations often depends on who has the burden of proof on the specific subsidiary questions which arise in such cases.

In civil tax cases, the taxpayer has the burden of proving error in the deficiency determined by the Commissioner, but the Commissioner has the burden of establishing fraud. In two recent cases in which there was no substantial evidence from either side as to the starting net worth, the Tax Court decided these issues strictly on a burden of proof approach. In each case, it concluded that the taxpayer had failed to prove error in substantial deficiencies computed by the Commissioner on the net worth basis; but it also concluded that since its deficiency findings were based simply on the legal presumption of correctness rather than on affirmative evidence, they would not support the fraud penalties which the Commissioner had assessed. See *Estate of Maurice J. Lydon*, 11 T.C.M. 1119 (1952), and *Estate of Halley Tarr*, 11 T.C.M. 1151 (1952).

Situations of this kind suggest a need to re-examine the rules regarding the burden of proof in civil cases when the Commissioner applies an "indirect" method of computing income. The importance of the burden of proof is revealed in the fact that, although the Tax Court found a substantial deficiency in practically all of the thirty "fraud" cases reported from June to November, 1952, the fraud penalty was sustained in only seventeen.

Living expenses and other nondeductible disbursements. In civil cases, reasonable estimates of living expenses may be made by the Bureau, in addition to specific known disbursements of a nondeductible nature. In criminal cases, estimates and assumptions are improper, and specific proof must be introduced by the Government in support of its computations; if the revenue agents, however, obtain the taxpayer's own estimate of his living expenses, which they frequently do, they can include the estimated sum in making their computations of income. Because the Government has rarely relied on its own estimates in criminal tax cases, there has, until recently, been virtually no judicial discussion of this question.

In *Caserta* v. *United States*, __F. 2d__ (3d Cir. 1952), attention was focused on this point. The *Caserta* case was described in coast-to-coast wire service reports as holding that the use of the net worth method in a criminal tax evasion case is illegal because it shifts the burden of proof to the defendant. Actually, however, the court recognized the Government's right to use this method in proper cases and ruled only that there was error in the *manner* in which the computation of nondeductible expenditures was made in the case before it. After computing the defendant's increase in net worth, the Government had added specific personal expenditures shown by the evidence (including cash payments for a boat and an automobile), and then it also added various cash withdrawals from the defendant's bank account *on the assumption, without proof*, that these sums represented *additional* personal expenditures. Since the cash withdrawn from the bank might very well have been the source of the specific

cash expenditures shown by the evidence, it is obvious that the Government's assumption (which the jury apparently shared) shifted the burden of proof on this question to the defendant and reversed the presumption of innocence. The court ordered a new trial because of this error.

Proof of nontaxable receipts. Since the increase in net worth will include any sums received as gifts, inheritances or as long-term capital gain, proper allowance must be made for such items in computing the taxable net income. When the deficiency is based on specific items of unreported income, the source of each item is known, and the question of taxability ordinarily presents no problem. But the net worth method usually does not disclose the *source* of the assets, and it is accordingly not readily evident whether nontaxable funds have been received. The decision will usually turn, therefore, on who has the burden of proof.

In most reported criminal cases, the Government has met this burden by testimony that the taxpayer admitted to the agents that he had not received gifts or inheritances, or that all of his net worth was accumulated from taxable receipts. The *Jelaza* and *Bell* cases, decided by the Fourth Circuit Court of Appeals, and discussed previously in connection with beginning net worth, are also relevant here. The taxpayers in those cases claimed to have received funds from their respective parents, and the Government introduced circumstantial evidence tending to show that the parents had never owned any substantial assets (such as proof that the parents had lived in a manner indicating poverty). In both cases, the Fourth Circuit Court of Appeals held that the prosecution had made out a *prima facie* case. Apparently, the court thought that the making of some "explanation" by the taxpayer warranted the implication that he had no other defense to offer; evidence which contradicted the explanation thus met the burden of proof sufficiently to get to the jury.

In criminal cases, all of these questions turn upon the basic attitude of courts and juries toward circumstantial evidence: How completely must the circumstances point to guilt to warrant conviction in a wholly circumstantial case? For a net worth case is based on inferences drawn from circumstances. First the jury is asked by the Government to infer that the defendant had no assets or liabilities at the pertinent dates other than those described in the Government's proof. Having accepted that conclusion, the jury is then asked to infer that the increase in net worth represents current taxable income rather than nontaxable receipts. Then, for the amount of unreported income computed in this way, the jury must infer that the defendant knew his return to be false when he filed it. The longer this chain of necessary inferences, the more tenuous the thread which runs from the factual testimony to the ultimate conclusion of guilt, and the greater the concern of the courts that the circumstantial evidence point unerringly to guilt. Conversely, if there is direct evidence of unreported income or of a tax evasion motive, the net worth computations acquire more of a corroborative nature, and the conviction need not rest primarily on circumstantial evidence.

Contributed by Committee Member Spurgeon Avakian

The Japanese Judiciary

(Continued from page 215)

tion Law, there are five kinds of courts: the Supreme Court as the highest court; High Courts under the Supreme Court; District Courts and Family Courts under the High Courts; and Summary Courts as the lowest courts.

The above five kinds of courts respectively have powers or authority as follows:

(1) The Supreme Court—

The Supreme Court is the one highest court of final instance. It is situated in the Metropolis of Tokyo. As a rule, the Supreme Court does not handle the case in the first instance, but exclusively cases which may be appealed to it from the high courts by the reason of unconstitutionality or violation of other important laws or ordinances.

In addition, it must be noticed that the Supreme Court is, as stated before, vested with the rule-making power under which it determines the rule of procedure and of other matters, and may handle the administrative business such as the appointment of judges, the appointment and dismissal of personnel of courts other than judges, the business of court account, etc. These affairs, controlled by the Minister of Justice, a member of the cabinet in the past, have been transferred to the hand of the Supreme Court by the new constitution. These judicial administrative affairs are determined through the Judicial Assembly of fifteen judges composing the Supreme Court. As the auxiliary organ that manages these affairs there is established a "General Secretariat" in the Supreme Court.

(2) High Court—

High Courts are respectively situated in the eight great cities of Tokyo, Osaka, Nagoya, Hiroshima,

Fukuoka, Sendai, Sapporo and Takamatsu.

As a rule, a high court handles the cases which may be appealed from district courts or family courts of the first instance.

In addition, however, high courts may, as courts of first instance, hear cases which may be appealed to them from such quasi-judicial tribunals as the Fair Trade Commission or the Patent Bureau, and cases concerning the election, or the civil war, etc.[5]

(3) District Court—

District Courts are forty-nine in number, each exercising jurisdiction in one of the forty-nine judicial districts into which the country is divided.

A district court is primarily the court of first instance, and handles the case in the first instance, except ones specifically provided for by law to be handled by the high court, the family court and the summary court. The aforesaid noncontentious matters are also handled by this court.[6]

(4) Family Court—

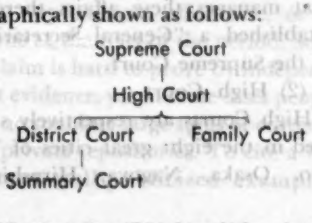
Family Courts are the special courts which were established on January 1, 1949, upon the consideration that it is proper that the aforesaid domestic and juvenile cases that closely affect the home life be handled by a court other than the one handling the general cases. They are established in the same places as district courts.[7] The family court disposes of cases speedily by summary procedure.

(5) Summary Court—

Summary Courts are five hundred and sixty-eight in number, and are situated in principal cities, towns, and villages.

The summary court has the authority to try comparatively minor civil and criminal cases by a summary procedure and to issue warrants for arrest, seizure, search, etc.

The aforesaid system of court is graphically shown as follows:



Such an exercise of authority by the courts is explained in brief as follows:

The Supreme Court, as a rule, handles the case of unconstitutionality through a collegiate body composed of fifteen judges and other cases through a collegiate body of five judges. The high court, as a rule, hears the cases in a collegiate body of three judges, and the district court handles cases through one judge as a rule and does the confused or difficult cases through a collegiate body of three judges. The family court and the summary court carry out the trial through one judge.[8]

Independence of Judges Is Provided For

The courts have come to hold strong authority and bear a grave mission. It naturally follows that the judge in charge of exercising the authority is specifically required to have a broad view and extensive knowledge of law. Therefore, the Court Organization Law makes the qualifications for the appointment of judges strict as compared with that for administrative officials or others. That is to say, no person shall be appointed a judge unless he shall have passed both the judicial type higher civil service examination and the examination at the end of two years' training at the Judicial Research and Training Institute attached to the Supreme Court, and had not less than ten years' actual practice of law as a jurist—*e.g.*, the assistant judge, public procurator, lawyer, etc. In this respect there is a difference between the qualifications for general administrative officials who are enough qualified for appointment by passing only the national public service personnel examination of a lower standard than required for judges.

However, there are slightly different provisions as to the qualifications for the judge in both the Supreme Court as the highest court and the summary court that disposes of minor cases summarily. Namely, as to the judges of the Supreme Court, at least ten of them must be those who have shown good results for twenty years as general judges, public procurators, lawyers, etc. The other five are not necessarily required to be jurists, but only to be first class personages of broad vision in the country.

As to the judge of the summary court, he is not required to be a jurist having as long experience as the general judge. There is also a way open for a man of ability other than a jurist to be appointed judge of the summary court.

Ordinarily, the judge is appointed by the cabinet, but the president of the Supreme Court is appointed by the Emperor as designated by the Cabinet, and the presidents of the high courts are appointed by the cabinet and attested by the Emperor.

While the judge, as stated before, is adequately guaranteed for his status in view of the gravity of his duty, there are many systems to prevent the unsuitable or unreliable judge from disgracing his position: (1) the judge can be removed through trial by the Court of Impeachment of Judges composed of the members of both Houses when he has committed vicious acts; (2) the appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their ap-

5. Some high courts with pretty large areas of jurisdiction have their branches, which also handle the cases. There are six such branches established in the country.

6. Some district courts have their branches for approximately the same reason stated above as to the high courts. There are 232 such branches in the country.

7. There are the same number of family courts' branches as district courts'.

8. As compared with the prewar days, the number of cases handled by the courts is considerably increased; the number of cases in 1951 is more than that in a year of prewar days by 50 per cent. This is thought to be not only because the offences have been increased in number in accordance with the confused social state of the postwar days but also because the authority of courts has been expanded as stated before, and the people, having given away the settlement of controversies by the unreasonable way, are intending to rely upon the court as the democratic idea has been disseminated.

pointment, and when the majority of the voters favors the dismissal of a judge, he shall be dismissed; (3) All other judges hold office for terms of ten years with the privilege of being reappointed; (4) there is a system of age of retirement for the judge; it is provided that when he has reached the specified age at which he is, in the general consideration, unable to exercise his duty perfectly, he shall automatically retire from his post.

Thus it is secured that the competent personage who is able enough to pursue the important duty of trial will carry out his duty with justice.[9]

Personnel of Courts Other Than Judges

Other than the judges, the courts have such officials as the Judicial Research Officials, Court Clerks, Domestic Matters Investigators, Juvenile Investigators, Bailiffs, Marshals, Court Secretaries, etc.

(1) Judicial Research Officials—

As the assistants of judges of the Supreme Court or the high courts, the Judicial Research officials conduct the necessary research in connection with the hearing and decisions of cases.

(2) Court Clerks—

Court Clerks are responsible for preparing the record in attendance at the examination, and for filing and having custody of the records and other documents concerning the cases of the courts.

(3) Domestic Matters Investigators and Juvenile Investigators—

Either of them works in the family court, and the former exercises the investigation of necessary matters concerning the aforesaid domestic cases and the latter the juvenile cases.

(4) Bailiffs—

The Bailiff is responsible for preparation for opening the court, and for the adjustment and maintenance of order in the courtroom upon the order of the judge.

(5) The Marshals—

They manage the execution of judgments in civil cases, the service of documents and other affairs.

(6) Court Secretaries—

In contrast with the aforesaid court officials (1) to (5) having a direct relation to the trial, the Court Secretaries are the officials who administer, upon the order of their superiors, the affairs of the courts.

After the enforcement of the new constitution, the above-mentioned court officials are appointed and dismissed at the court's own discretion in the light of the respect for the independence of the court, as stated before.[10]

Needless to say, the public procurator is a public servant to bring, maintain and prosecute a public action in criminal cases as a representative of the state, and to superintend the execution of penalty. In the days of the old constitution, the public procurator worked for the procuratorial office attached to the court, and was subject to the supervision of the Minister of Justice together with the judge. As the court has been distinctly separated from the executive in accordance with the enforcement of the new constitution, the public procurator's office has been established as a government office entirely different from the court. The public procurator, who in substance is an administrative official, is subject to the general supervision and control of the Attorney General, a member of the cabinet.

However, to be a public procurator specific legal knowledge and experience are necessary. Unlike the general administrative official, the public procurator is required to have specific qualifications for the appointment as stated in relation to the qualifications for the judge, and is treated better than the general administrative official though of course worse than the judge.[11]

The lawyer is the professional to carry out the suit as the representative of the party in the civil case, and to take charge of defending the accused as the defense counsel in the criminal case and to handle all other legal offices. Then, in view of the nature of offices handled, the qualification for the lawyer is exactly the same as for the public procurator. The lawyers are organizing a Lawyer's Association in every specified area and the Japan Federation of Bar Associations throughout the country, both of which are exercising autonomous supervision over lawyers for the purpose of improvement and development of offices of lawyers as well as maintenance of their dignity.[12]

Prior to World War II, the judge was brought up exclusively from the probationary judge, and the lawyer was seldom appointed a judge. After World War II, when the gravity of duty of the judge had been further recognized, the excellent lawyers were appointed the judges, a practice of much benefit to the elevation as well as development of the judicature.

People Participate In Judicial Proceedings

There is no doubt about the fact that there are occasions when a civilian is party to proceedings, as a party in the case or a witness, an expert, etc. However, other than this, there are other ways in which civilians

9. As of the end of October, 1952, the total number of judges of our country is 1652 (made up as follows: 15 . . . Supreme Court, 219 . . . high courts, 649 . . . district courts, 156 . . . family courts, 613 . . . summary courts.)

In addition, a total of 431 assistant judges are attached to district courts and family courts. As a rule, the assistant judge can not try and determine the case by himself. Except that he can be a member of the collegiate body, he cannot conduct any proceeding but a comparatively minor one.

10. These court officials are 9066 in number as of the end of October, 1952.

There are the public procurator and lawyer, who are not court officials but in a close connection with the court.

11. The total number of public procurators is 1683 as of the end of 1951.

12. The total number of lawyers in the country is 5877 as of the end of October, 1952.

directly participate in judicial proceedings.

The most typical is jury duty. This system had been in force in our country since 1928, but during World War II it was suspended because of war and has not yet been resumed.

However, there are such systems as "Judicial Commissioner", "Expert Committee", "Councillor" and "Conciliating Committee".

The Judicial Commissioner, Expert Committee, Councillor and Conciliating Committee are akin to one another on a point that they are respectively selected from among the people in general by the court and participate in the proceedings in any form. But there are the following differences as to their duties.

(1) Judicial Commissioner—

Participating in the civil proceedings at the summary court, the Judicial Commissioner presents his reference opinions to the judge deciding the case and assists the judge as to his recommending a compromise on the case to the parties.

(2) Expert Committee—

In the trial of disputes relating to the lease of land and house at the district court, the Expert Committee renders the reference opinions to the judge based upon their professional knowledge and experience concerning the problem of the lease of land and house.

(3) Councillor—

In case the family court conducts proceedings to form, change or extinguish the relation or status, the Councillor assists the judge by rendering his opinion to the judge.

(4) Conciliating Committee—

Ordinarily, two members of the Conciliating Committee and one judge compose a specific organ called "Conciliation Committee".

It is the duty of the Conciliation Committee to contrive the peaceful settlement of disputes on fair conditions, recommending mutual concession as well as compromise to both parties as to all kinds of civil disputes based upon the desire of the parties or persuading both parties in presentation of the plan of compromise considered proper in certain circumstances—this procedure is called "Conciliation".

Of the above systems, both systems of Expert Commissioner and Conciliation Commissioner have been existing ever since prewar days, but both systems of Judicial Commissioner and Councillor were newly established after World War II for the purpose of thorough dissemination of the judicature. All of them have been fully utilized and realizing the anticipated result since their establishment.

Ultimately, here is taken the system of "the Committee for the Inquest of Prosecution", which is not the system that the people participate in judicial proceedings, but the remarkable system that the people directly participate in the function of judicature in its widest sense.

This system is to attempt the proper exercise of the right of public action in reflection of the public will, and is, so to speak, the substitution for the system of "Grand Jury" in America and England. This is to say, the Committee for the Inquest of Prosecution is an organization composed of eleven members selected by ballot from among the people with the right of election like jurors. This organ has the object to review whether or not the disposition of non-prosecution by the public procurator is proper; when it is considered improper, it recommends the public procurator to prosecute and makes necessary proposals on the improvement of the office of the prosecution.

At present, we have 203 Committees for the Inquest of Prosecution throughout the country, which have rendered great services to the proper administration of the system of prosecution since their establishment in July, 1948.

The Lawyer and Commercial Arbitration

(Continued from page 196)

The congestion of our modern courts has been a major contributing factor to the increased use by businessmen of arbitration, and probably also to the gradual acceptance by lawyers and judges of this departure from the traditional courtroom proceeding.[23]

In many metropolitan cities, litigants must wait as long as three years before a case, once all the pleadings are completed, comes to trial. On October 23, 1952, the Chicago press reported the bar association there gravely concerned over a backlog of 52,000 cases in the County, Circuit and Superior Courts. Certainly a three-year lapse before a litigant may be heard is a demonstrable example of justice delayed being justice denied.[24]

At this point, I should like to offer one word of caution to prospective arbitrators. The extension of their jurisdiction in a particular arbitration and the form of their award are matters of considerable importance if their conclusions are to be sustained by a reviewing tribunal. For it is now well settled that ultimately the question of the construction of a contract, to determine what queries the parties agreed to submit to arbitration, is one for the court to decide and not for the arbitrators themselves. To allow the arbitrators conclusively to decide what questions were submitted to arbitration, is to allow them finally to determine the extension of their own jurisdiction. There are many cases so holding.[25]

23. Professor Hurst correlated this court congestion with increased use of arbitration, finding "that courts disposed of steadily, even vastly increasing, volumes of civil litigaton through 1900. Thereafter the competition of administrative decision and commercial arbitration began to cut the proportion of dispute business that went to court".

24. Los Angeles is an exception, despite its phenomenal population growth and inevitable increase in case filings, while economy-minded legislators have failed to provide a corresponding increase in quantity of judges. Nevertheless, the judiciary in Los Angeles County has a fine record of disposition of work. Although 85,475 cases were filed in Los Angeles County Superior Court in 1951, an increase of 3,000 over the previous year, at the end of the year there was a backlog of only 6,268 contests awaiting trial. As of the first of 1952, jury trials were being set for nine months after requests were made, and nonjury cases in six months.

25. See A.L.R. 364.

To avoid this danger of having the reviewing court find an award to be in excess of jurisdiction, the arbitrators should be particularly wary of their written opinion. Although technical precision is not required in an award of arbitrators,[26] I would urgently suggest that arbitrators follow the form of award provided by the American Arbitration Association. In the event they feel impelled by some uncontrollable urge, literary fluency, good conscience, or mere garrulousness to express themselves about the case they have tried, the opinion should be a separate document and not part of the award itself. Thus it would be comparable to a trial court's opinions, which appellate courts have consistently held are not controlling in the event they are in conflict in any respect with findings of fact and conclusions of law.

From time to time efforts have been made to extend arbitration to other uncharted areas, those which courts of law have rather jealously guarded. I have in mind particularly probate and domestic relations.

Though there is a conflict in opinion, the generally prevailing rule seems to be that neither an executor nor contesting heirs may agree to arbitrate their controversy.[27]

The courts point out that the matter of the probate of a will is a proceeding in rem binding on the whole world, and that a few individuals claiming to be the heirs cannot by stipulation for arbitration determine the contest.[28]

In probate, obviously there cannot be an agreement to arbitrate future disputes, for, while death is inevitable we are told, the possibility of a post mortem conflict between relatives is seldom anticipated. So arbitration is attempted in the field of probate only after an actual controversy has arisen. Since the probating of wills, approval of the accounting by executors, and final distribution must be by court order, it is a detour from expeditious procedure to leave one tribunal, submit limited matters to another, and ultimately return to the original forum. Certainly the concept that arbitration avoids litigation cannot be realized in probate.

On the other hand, the States of Alabama, Kansas, Mississippi and Illinois seem to permit probate disputes to be settled by arbitration.[29]

In the field of domestic relations, the leading reported case on alimony and child support being submitted to arbitration is *Re Stern*, a 1941 New York decision.[30] In that case the estranged husband and wife by written stipulation submitted the question of the amount of support the husband should pay to the wife and children to an arbitrator, who took testimony and made an award. The court rather summarily stated it to be well established that such matters cannot be made the subject of arbitration.

Here again, like probate, is a field in which arbitration cannot arise until after the controversy reaches fever heat. Or can you conceive of a marriage ceremony in which the bride and groom solemnly exchange vows that in the event of a future divorce, they will submit all questions to an arbitrator to be selected by the American Arbitration Association?

But to get back to the commercial area. The inevitable conflict is between those who contend for the application of certainty in determination of disputes versus those who want fluidity. These views are best expressed by Roscoe Pound and Jerome Frank.

Dean Pound has spoken for rigidity in interpreting commercial transactions:

> In matters of property and commercial law, where the economic forms of the social interest in the general security—security of acquisitions and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is wise social engineering. Our economically organized society postulates certainty and predictability as to the incidents and consequences of industrial undertakings and commercial transactions extending over long periods. Individualization of application and standards that regard the individual circumstances of each case are out of place here . . . . The circumstances of the particular case cannot be suffered to determine the quality of estates in land nor the negotiability of promissory notes. One fee simple is like another. Every promissory note is like every other. Mechanical application of rules as a mere repetition precludes the tendency to individualization which would threaten the security of acquisitions and the security of transactions.[31]

In justice to the learned Dean, however, I should point out that he

26. *Dugan v. Phillips*, 77 Cal. App. 268, 246 Pac. 566.

27. *Campbell v. Detroit Trust Co.* (Mich.), 266 N.W. 351, 104 A.L.R. 348.

28. *Carpenter v. Bailey*, 127 Cal. 582, 60 Pac. 162; *Newbales v. Newbales*, 169 Ark. 282, 273 S.W. 1026; *Miller v. Moore*, 7 Pa. 164.

29. *Jones v. Blalack*, 31 Ala. 180; *Anderson v. Beebe*, 22 Kans. 768; *Fort v. Battle*, 13 Miss. 133; *Casstevens v. Casstevens*, 227 Ill. 547, 81 N.E. 709.

30. *Re Stern*, 285 N.Y. 239, 33 N.E. 2d 689, 133 A.L.R. 1334. However, *Robinson v. Robinson*, 296 N.Y. 778, 71 N.E. 2d 214, reaches an apparently contrary conclusion without opinion. For a further discussion see 46 *Columbia Law Review* 841, which suggests "considering present-day approval of both arbitration and separation agreements, it is submitted that provisions for arbitration of maintenance payments should be enforced by the courts".

31. Pound, *Interpretations of Legal History*, page 154.

suggests a different standard for cases raising problems of "human conduct", or involving the conduct of enterprise, fraud, good faith, negligence, or fiduciary duties.

Judge Frank argues in essence for individualization:

> In respect to the law: If we relinquish the assumption that law can be made mathematically certain, if we honestly recognize the judicial process as involving unceasing adjustment and individualization, we may be able to reduce the uncertainty which characterizes much of our present judicial output to the extent that such uncertainty is undesirable. By abandoning an infantile hope of absolute legal certainty we may augment markedly the amount of actual legal certainty. . . . It is about time to abandon judicial somnambulism.[32]

My conclusion is that one need not go all the way with either the most enthusiastic advocates of arbitration that it is a nostrum for all judicial ills, or with the staunchest defenders of the legal *status quo* who find no advance possible for our present courtroom adversary practice. As Philip G. Phillips wrote, "to assume that the very defects of our court proceedings would not be transferred to a wholesale system of arbitration, to assume that clients as well as attorneys would act on a different moral level, shows a naive love of human nature, or of the arbitral process. Contentious, low-moralled or profit-seeking parties can turn any type of dispute-resolving process into a mockery of justice, except under the strictest, wisest, most honestly administered system of public tribunals."[33]

It seems certain that either method of resolution of controversy depends upon the good faith of the contestants and the wisdom of the arbitrator or judge. There is no system yet devised that can eliminate the human equation.

But in the final analysis, there need be no conflict between arbitration and the lawyers on one hand, or arbitration and the judiciary on the other, for neither field is a panacea for all the ills of commercial conflict. Both may well exist in complementary relationship, with each exuding its value to the body politic and economic.

32. Frank, *Law and the Modern Mind*, page 159.

33. 48 *Harv. L. Rev.*, 141.

The Economics of the Legal Profession

(Continued from page 219)

fourth in both lists with 8.5 per cent of the value added. Pennsylvania with 5.1 per cent of the lawyers in fourth rank accounts for 9.3 per cent of the value added by manufacture and stands second in this group. On the other extreme, those states with a comparatively small number of lawyers (Delaware, Nevada, Wyoming, Vermont, New Hampshire and New Mexico) also have little manufacturing activity as measured by value added (35, 49, 46, 38, 37 and 45 respectively) or even by the number of manufacturing establishments.

2. *Trade*

All the economic series on trade show a very high correlation with the percentage of lawyers of the states. The number of establishments (retail, wholesale and service) in a state as percentages of the country's total firms show high direct relationships (.94, .87 and .96 respectively) with the state's percentage of lawyers.

Correlation between Retail Sales and Lawyer Population Is Close

On a straight comparison of the two percentages involving retail sales and lawyers, the relationship is also very close. New York which has 16.7 per cent of the country's lawyers has 11.1 per cent of the retail establishments; Illinois with 8.3 per cent of the lawyers accounts for 5.8 per cent of the retail establishments; California with 6.3 per cent of the lawyers has 6.8 per cent of the retail establishments; Ohio with 5.6 per cent of the lawyers has 4.9 per cent of the retail firms; Pennsylvania 5.1 per cent and 7.3 per cent; Texas with 4.8 per cent and 5.1 per cent; Massachusetts with 4.1 per cent and 3 per cent; New Jersey with 3.4 per cent and 3.9 per cent; Michigan 3.2 per cent and 3.9 per cent and Missouri with 2.9 per cent in both categories. On the other extreme those states with comparatively few retail establishments (Nevada, Wyoming, Delaware and Vermont) also account for a small part of the lawyers in the country.

The correlation between the number of lawyers and the retail establishments in the state is further emphasized and borne out by comparing the state ranks of the two categories. New York stands first on both lists; Illinois ranks second in lawyer count and fourth in retail stores; California stands third in both groups, Ohio is fourth in lawyer count and sixth in retail trade firms; Pennsylvania stands fifth in lawyer count but second in retail trade rank. At the other extreme, the last three states in lawyer count are Wyoming, Nevada and Delaware and these states make up the bottom of the retail trade list. Missouri is tenth on both lists; Indiana twelfth; Iowa seventeenth. On the other hand, several states show wide variations: Oklahoma ranks fourteenth in lawyer count but twenty-third in retail establishments; Maryland ranks eighteenth in lawyers but ranks twenty-seventh in retail firms; and North Carolina ranks thirteenth in retail firms but twenty-fourth in lawyer count.

Using *wholesale* trade figures, there is also a relationship between the number of wholesale trade firms and the number of lawyers in the state. New York accounts for 16.7 per cent of the lawyers and 18 per cent of the wholesale firms; Illinois with 8.3 per cent of the lawyers has 7.2 per cent of the wholesale firms; California 6.3 per cent and 7.6 per cent; Ohio 5.6 per cent and 4.5 per cent; Pennsylvania 5.1 per cent and 6 per cent; Texas 4.8 per cent in both categories; Massachusetts 4.1 per cent and 3.2 per cent; New Jersey 3.4 per cent and 2.3 per cent;

and Michigan 3.2 per cent and 3.5 per cent respectively. At the other extreme, Vermont, Wyoming, Nevada and Delaware account for the lowest percentages in both groups. In ranks, there is also a positive correlation, for New York is first on both lists; Illinois second in lawyer count and third in wholesale firms; California third in lawyers and second in wholesale establishments; Ohio fourth and sixth; Pennsylvania fifth and fourth; Texas sixth and fifth; and Massachusetts seventh and ninth. At the bottom of the ranking lists, the correlation is very positive.

Relating the lawyers in the state to the *service* establishments gives us the same general results. In Service Establishments, the United States Department of Commerce includes not only personal and professional services but also such industries as hotels, motion pictures, theaters, miscellaneous repair services, commercial and trade schools. The states with the greatest number of lawyers also have the greatest number of service establishments. In rank by lawyers, the first ten states are New York, Illinois, California, Ohio, Pennsylvania, Texas, Massachusetts, New Jersey, Michigan and Missouri; in service establishment rank, they are respectively first, fourth, second, sixth, third, fifth, ninth, seventh, eighth and tenth. The last ten states in lawyer rank are South Dakota, Montana, North Dakota, Idaho, New Mexico, New Hampshire, Vermont, Wyoming, Nevada and Delaware; in service establishments, these states are among the last ten states.

The above positive correlations between the number of firms in trade (retail, wholesale and service) and the number of lawyers in the state are further emphasized if we use dollar figures for trade representing retail and wholesale sales and service receipts.

Several states, however, (Washington, D. C., Oklahoma and Arkansas) show a marked higher percentage of lawyers than might be expected from the trade figures, while three other states (California, Pennsylvania and Minnesota) show a marked lower percentage of lawyers than might be expected from the dollar trade sales of the state. All these states show wide variations in correlation of trade sales figures and number of lawyers.

The close relationships between the state's sales and lawyers are further emphasized by a comparison of rankings. In retail trade sales, the leading ten states are New York, California, Pennsylvania, Illinois, Ohio, Texas, Michigan, New Jersey, Massachusetts and Indiana; these states in total account for 57.7 per cent of the retail sales in the country; these states respectively rank first, third, fifth, second, fourth, sixth, ninth, eighth, seventh and twelfth in lawyer count and account for 61.7 per cent of all the lawyers in the country. At the other extreme, the last ten states in lawyer count have 2.4 per cent of the lawyers but also are among the last ten states in retail sales and account for 3.6 per cent of the retail sales in the country.

Wholesale trade sales as well as receipts for service establishments show the same relationship with the number of lawyers in the state as do retail trade sales with a few slight variations. Connecticut which ranks twenty-first and thirtieth in retail and wholesale sales ranks nineteenth in service receipts and twenty-sixth in lawyer count. Iowa ranks fourteenth in retail sales, twelfth in wholesale sales but twenty-second in service receipts and seventeenth in lawyer count. Florida stands fifteenth in retail sales; twenty-fourth in wholesale sales but is twelfth in service receipts and sixteenth in lawyer count. Apart from these wide variations, the economic activity as measured by the state's retail sales and wholesale sales and the service firm receipts of the states are closely related to the lawyer count in the state.

In brief then, the state's percentage of lawyers is highly related to the state's proportion of economic activity, as measured by number of trade, manufacturing and corporate establishments and sales of wholesale, retail and service firms. These factors may indeed help to explain the demand for legal services in the state. Population is another factor which directly affects a state's proportion of lawyers. At the same time, per capita income or value added by manufacture in the state does not seem to be related to the state's percentage of lawyers. In spite of the high correlation between the state's economic activities and its lawyers, several areas (notably Washington, D.C., Oklahoma, Arkansas and Nebraska), show some high positive variations from these relationships, while Pennsylvania, New York, Connecticut and Michigan show high negative variations, all of which cannot be explained merely from the economic data studied.

VI. Lawyers and Income

Income figures for 1947 for the United States reveal some interesting data.[24] Whereas the total income for all unincorporated enterprises in that year was 36.9 billion dollars, legal services accounted for 1.02 billion dollars or 2.8 per cent of the total. In contrast, medical services accounted for more than twice legal services with 2.1 billion dollars or 5.7 per cent of the total. Business was the major beneficiary with 17.7 billion dollars or 48 per cent of the income of all unincorporated enterprises in 1947.

In 1948, the mean net income of all lawyers in the country reached

24. U.S. Dept. of Commerce, "National Income", (1951 edition), page 70.

$8,315 and the median net income was $6,336.[25] Compared with physicians and dentists, lawyers occupy an intermediate position as to average net income, below physicians but above dentists.[26] Furthermore whereas the average net income of all nonsalaried independent lawyers rose 46 per cent from 1929 to 1949, the average net income of physicians rose 125 per cent in that same period.[27] The mean net income of nonsalaried lawyers for 1948 was $8,121 or 47 per cent above the $5,534 income of 1929 and 69 per cent above the mean of $4,794 in 1941. In median net income there was an increase of 93 per cent from 1941 to 1948 for nonsalaried lawyers.

Income of lawyers varied by states as shown by Table 4. Incomes of lawyers in the Middle East and Far West sections are uniformly and markedly higher than in any other region, whether all lawyers, independent lawyers or salaried lawyers are considered, and whether the mean or median is used. All averages for these two regions (except, by a small margin, those for salaried lawyers in the Far West) are above the corresponding national averages, and no average for any other region is as high as the national average.[28]

California, New York, Pennsylvania Report Highest Average Incomes

Among the larger states, lawyers in California, New York and Pennsylvania reported the highest average incomes. The lowest average incomes are found in Iowa, Alabama, Arkansas, Kentucky, Virginia, Minnesota, Colorado and Nebraska. The highest average incomes are found in the District of Columbia, New York, California, Pennsylvania, North Carolina, Illinois and Michigan. The range of average net income goes from $4,824 in Iowa to $9,910 in the District of Columbia and $9,752 in California.

In median net income, Pennsylvania and the District of Columbia

TABLE 4

Average Net Income of Lawyers, by Major Source of Legal Income, by Regions and for Selected States, 1947

Region and State*	Percent in each region	All lawyers: Mean net income	All lawyers: Median net income	Major independent: Mean net income	Major independent: Median net income	Major Salaried: Mean net income	Major Salaried: Median net income
NEW ENGLAND	6.5	$6,981	$5,240	$7,064	$5,150	$6,830	$5,594
Connecticut		8,532	6,250	(1)	(1)	(1)	(1)
Massachusetts		6,942	4,933	7,159	3,812	6,641	5,438
MIDDLE EAST	30.0	8,779	6,566	8,948	6,246	8,546	6,910
District of Columbia		9,910	7,000	14,317	7,375	7,350	6,625
Maryland		7,074	5,909	6,871	5,389	(1)	(1)
New Jersey		6,930	5,667	6,246	6,021	(1)	(1)
New York		9,024	6,632	9,357	6,224	8,608	7,068
Pennsylvania		8,731	7,017	7,995	6,156	10,443	8,688
SOUTHEAST	13.5	6,566	5,201	6,617	4,647	6,375	5,906
Alabama		5,532	5,208	(1)	(1)	(1)	(1)
Arkansas		5,756	4,313	5,772	3,250	(1)	(1)
Florida		6,755	4,857	6,824	4,679	(1)	(1)
Georgia		8,619	6,313	9,102	6,450	(1)	(1)
Kentucky		5,190	4,375	4,705	3,607	(1)	(1)
Louisiana		7,976	6,063	(1)	(1)	(1)	(1)
North Carolina		8,093	5,700	7,625	4,500	(1)	(1)
Tennessee		7,230	6,083	7,816	6,833	(1)	(1)
Virginia		5,359	4,214	5,059	3,979	(1)	(1)
SOUTHWEST	7.2	6,177	4,660	6,137	3,976	6,254	5,224
Oklahoma		5,314	3,896	4,801	3,125	6,095	5,281
Texas		6,289	4,690	6,241	3,925	6,374	5,156
CENTRAL	28.7	7,040	5,391	6,854	5,033	7,380	6,022
Illinois		8,326	6,134	7,842	5,462	8,915	6,450
Indiana		6,100	5,400	6,062	5,556	(1)	(1)
Iowa		4,824	4,120	4,767	3,977	(1)	(1)
Michigan		8,306	6,594	8,914	6,500	7,514	6,650
Minnesota		5,369	4,500	5,297	4,442	(1)	(1)
Missouri		6,856	5,219	7,208	5,500	6,440	5,125
Ohio		7,442	5,342	7,359	5,309	7,632	5,385
Wisconsin		6,033	5,092	5,899	4,625	6,362	5,453
NORTHWEST	4.8	5,933	4,790	6,032	4,656	5,638	5,021
Colorado		5,785	4,643	5,776	4,125	(1)	(1)
Kansas		6,369	4,850	(1)	(1)	(1)	(1)
Nebraska		5,757	4,667	(1)	(1)	(1)	(1)
FAR WEST	9.3	8,679	6,608	9,259	7,039	7,549	6,089
California		9,752	7,313	10,487	7,562	8,446	6,812
Oregon		6,427	5,167	(1)	(1)	(1)	(1)
Washington		6,294	5,450	6,869	6,000	(1)	(1)
UNITED STATES	100.0	7,532	5,698	7,517	5,303	7,560	6,134

*States with too few cases to yield reliable results are included in regional data, but not shown separately. In addition to the states listed above, the regions include the following states: New England—Maine, New Hampshire, Rhode Island, Vermont; Middle East—Delaware, West Virginia; Southeast—Mississippi, South Carolina; Southwest—Arizona, New Mexico; Central—None; Northwest—Idaho, Montana, North Dakota, South Dakota, Utah, Wyoming; Far West—Nevada.

Source: U. S. Department of Commerce, Office of Business Economics.

25. Weinfeld, *op. cit.*
26. *Ibid.*
27. In 1929, the two professions had approximately the same average net incomes, see Cantrall, *op. cit.*, page 197; see also *Survey of Current Business* (August, 1949; July, 1950, and July, 1951).
28. Weinfeld, *op. cit.*

lead with $7,017 and $7,000 respectively while Oklahoma and Iowa are at the bottom with median net incomes of $3,896 and $4,120 respectively.

These wide variations in the incomes of lawyers by states can partly be explained by the economic activities in the state. A positive correlation exists between the incomes of lawyers and all the economic series studies (net corporate income per lawyer in the state, service sales per lawyer, wholesale sales per lawyer and number of corporations per lawyer). Although the relationships between these economic series and the lawyers' incomes are not as high as the relationship between the state's percentage of lawyers and the state's economic activities, there is a definite positive correlation between the incomes of lawyers and the economic factors in the state.

Of special importance is the relationship between lawyers' incomes by states and the corporate net income of the state. By dividing the corporate net income of the state by the number of lawyers in the state, we have a series giving us the net corporate income per lawyer in the state. The simple correlation coefficient between this series and the incomes of lawyers by states is high (.61 or .79 if we exclude District of Columbia), showing a high positive relationship between lawyers' incomes and the corporate net income per lawyer in the state. Several states, however, show wide variations from this relationship; District of Columbia, Georgia and California show extreme variations whereby the incomes of the lawyers in these states are considerably higher than might be expected from the corporate net profits per lawyer in the state. New York, Pennsylvania, Illinois, Connecticut, Louisiana, Tennessee and North Carolina also have higher incomes for lawyers than might be expected from the corporate net profits per lawyer in the state. On the other hand, Iowa, Virginia, Minnesota, Wisconsin and Michigan show less income for lawyers than might be expected from the state's net corporate income per lawyer.

Another economic factor which shows a fairly high relationship with lawyer's incomes by states is the service sales per lawyer of the state. Excluding Washington, D. C., the simple correlation coefficient between these series is .72. Here again several states show wide deviations, for the incomes of lawyers in New York, California, Pennsylvania, Louisiana, Connecticut, North Carolina and Georgia are higher than might be expected from the state's service sales per lawyer. On the other hand, Iowa, Alabama, Virginia, and Minnesota show far lower incomes for lawyers than might be predicted from the state's service sales per lawyer.

One other series shows a high positive relationship to lawyers' incomes. Excluding Washington, D. C., the lawyers' incomes by states series is fairly highly correlated (.57) with the state's wholesale sales per lawyer. Several states (District of Columbia, California, Connecticut, New York, Pennsylvania, Georgia and Michigan) show a considerably higher income for lawyers than might be expected from the state's wholesale sales per lawyer. On the other hand, Iowa, Minnesota, Nebraska and Alabama show a smaller income for lawyers than might be predicted from the state's wholesale sales per lawyer.

On a rank basis, related to population and lawyers per capita, the income of lawyers by states has only a slight correlation. Whereas the District of Columbia has the greatest "lawyer concentration", it also stands first in lawyers' incomes. While New York follows the District of Columbia in "lawyer concentration", it ranks third in average lawyers' incomes. On the other hand, Alabama which has one of the lowest "lawyer concentrations" ranks twenty-fifth in income, while North Carolina with a

low concentration (one lawyer for every 1,581 persons) ranks high (ninth) in lawyers' incomes. A closer relationship is shown in the case of Kansas and Nebraska; whereas Kansas has one lawyer for every 1,038 persons and Nebraska has one lawyer for every 703 persons, Kansas ranks eighteenth and Nebraska ranks twenty-second in lawyers' net incomes.[29]

The income of lawyers by states shows a little more positive correlation to the per capita income of the states on a rank basis. Whereas the District of Columbia ranked first in lawyers' incomes; California ranked second; New York, third; Connecticut, sixth; and Illinois, seventh, these states ranked fourth, second, third, fifth and eighth respectively in per capita income list of states. On the other hand, Pennsylvania ranks fourth in lawyers' incomes but twentieth in per capita income. Georgia ranks fifth in average income of lawyers and fortieth in the per capita incomes of the states; Michigan, eighth and fourteenth; North Carolina, ninth and forty-third; Louisiana, tenth and forty-second; and Tennessee, twelfth and forty-first.

Other economic factors show little relationship to lawyers' incomes in the state. On a per lawyer basis, the number of corporate returns, the per capita income of the state, the retail sales, and even the population of the state fail to explain the variations in the incomes of lawyers. Although the correlation coefficients are all positive, the relationship is low and we cannot convincingly explain the variations of lawyers' incomes in the various states by the relative strength of demand for legal services in the various states, as represented by these economic variables.

In brief then, the results of the statistical findings are not conclusive for all the economic variables considered except corporate net profits per lawyer. In other words, the single most important economic factor accounting for the variations of lawyers' incomes seems to be the variation of the demand for legal services originated from "corporate net profit". Owing to the peculiar legal characteristics of corporations, the demand for the services of lawyers is highly correlated with the activities of the corporations in general, and the profitability of the corporations in particular. Furthermore, it should be noted that what corporations spend for legal services can be deducted by them on their income tax returns as business expense.

Even by using a multiple coefficient correlation analysis, the variation of lawyers' incomes, unexplained by the variation of the demand for lawyers' services originated from corporate net income, cannot be significantly explained by the variation of the demand for lawyers' services originated from the service sales. This conclusion is based on the fact that the multiple correlation coefficient is only slightly higher than the simple correlation coefficient. The states with the high positive deviations are Georgia, California, Louisiana, North Carolina and Washington, D. C., and the states with the high negative deviations are Iowa, Virginia, Minnesota, Wisconsin and Michigan. These variations cannot be explained by the strength of demand originated from corporate net income *and* service sales per lawyer of the state.[30]

Other studies do reveal some data explaining the variations in the incomes of lawyers by states. The studies by the U. S. Department of Commerce for instance reveal the following:[31]

(1) The larger the firm, the larger the average income of the lawyers who are members of the firm; the mean net income of lawyers who practiced alone was $5,759 whereas each lawyer in two member firms averaged $8,030 or 39 per cent more, and lawyers in firms of nine or more members had a mean net income of $27,246, or almost five times as great as for solo practitioners.

(2) Generally speaking, average income tends to increase as the size of the community increases; in 1947 independent lawyers in cities of a million or more inhabitants reported an average income two or three times as large as those in places having fewer than 1,000 inhabitants.

(3) Age as well as years in practice are clearly two of the most significant factors affecting the size of income. As in all occupational pursuits, the age-income pattern consists of low incomes at low ages, income rises as age rises until a peak (between 50 and 54 years of age) is reached and thereafter income gradually declines with increasing age.

(4) Lawyers who concentrate on personal services earn considerably less than lawyers who receive most of their income from services to business.

(5) The income of lawyers tends to be more unequally distributed than that of other professional groups.

In brief then, although lawyers' incomes are related to corporate net profits per lawyer in the state, the variations in the income of lawyers cannot be solely explained by this factor. The other economic variables (which are highly related to the number of lawyers in the state) do not help to explain these variations in incomes of lawyers even though they all show a positive correlation. For a more satisfactory analysis of these variations in the lawyers' incomes, more attention has to be paid to other factors including those of a noneconomic type—political and social forces which create a demand for legal services, the size of law firms, age of lawyers, the type of

29. There also seems to be no direct relationship between the ranks of incomes and lawyer counts. Except for Pennsylvania, Michigan and Florida, the net income rank is not directly related to the lawyers' count rank. Whereas Illinois stands second in lawyer count rank it rates seventh in the rankings of average net income of lawyers. Ohio ranks fourth in the number of lawyers and stands eleventh in incomes, Massachusetts has 4.7 per cent of the lawyers and ranks seventh but in lawyers' income it is fourteenth. Washington, D.C., is first in lawyers' incomes but eleventh in lawyer population; lawyers' incomes in Georgia rank fifth whereas its lawyers' count rank is twentieth. Other states where the incomes are far in excess of the lawyer count rank are North Carolina, Connecticut, Louisiana, Washington and Oregon.

30. For the most part, it should be noted that most of these states are primarily agricultural.

31. Weinfeld, *op. cit.*; see also Brown, *op. cit.* pages 185-196.

client, the variations in office organizations and in legal fees charged, the data by cities where lawyers and demands for their services are concentrated, the state restrictions on admissions to the Bar, legal indices[32] (including number of papers and suits filed, divorces, estates, appeals, bankruptcies, workmen's compensation and contract cases) and similar forces.[33]

VII. Conclusions

In brief, these studies show that the number of lawyers in a state, as a percentage of the country's total lawyers, is very highly correlated to the amount of the economic activity of the state, as measured by the population, the number of wholesale, retail, service, corporate and manufacturing firms, and the retail, wholesale and service sales. In view of these extremely high correlations, we are fairly certain that these indices are themselves positively correlated with the true forces creating demands for lawyers and legal services. The state's population is merely one economic factor which is highly correlated with the percentage of lawyers, whereas per capita income and value added show low correlations.

At any given time by analyzing the economic activity of the state and by comparing it with the economic factors of other states, we can obtain a good estimate of the comparative number of lawyers in the state, as a percentage of the total lawyers in the United States. Indeed, in the long run, theoretically the flow of lawyers in the various states is probably governed by the relative size of the economic activities of the state. In the short run, however, other factors may be more important; these factors may include the relative incomes of lawyers of the various states, the immobility of lawyers, the number of law schools in the state, the entrance-to-bar requirements, etc. These as well as other noneconomic factors may explain the marked variations which some states show in their percentage of lawyers compared to the state's economic activities.

The incomes of lawyers by states are generally correlated to the economic variables per lawyer of the state. Although these relationships are not as great as in the case of the percentage of lawyers, they are all positive and in the case of net corporate profits per lawyer in each state, there is an extremely high and significant correlation. Although the density of lawyers compared to the various economic activities of the state varies by state, these incomes are still positively correlated with the economic variables. In other words, the value of business activity per lawyer in the state (as evidenced by net corporate profits, wholesale sales and service sales) or the number of persons or firms per lawyer in the state (as evidenced by number of corporations and population) help explain the incomes of lawyers in the state.

Again, there are marked deviations from these relationships, for the variations in income cannot be explained alone by the economic variables on a per lawyer basis. These extreme variations in incomes are partly explained by years in practice, age differences in lawyers by states, size of community, types of clients and office organization of lawyers. Other factors which may help to explain these great variations in lawyers' incomes by states include legal indices, the type of fees charged, training and scholastic attainments, number of lay agencies competing with the legal profession, the admission requirements by states, the type of legal cases handled, and other social, political and economic factors including governmental action and regulation.

Other studies which deal with some of the factors not measured in this report may give additional explanations and reasons for the variations in lawyers' incomes by states. It is hoped that more definitive studies of these other factors may some day be made.

32. For a detailed list of legal indices used in one study, see Garrison, "A Survey of the Wisconsin Bar", *Wisconsin Law Review* (February, 1935), pages 145-146; see also Brown, *op. cit.*

33. For one recent approach to this problem in the State of Pennsylvania, see Fuller, "Legal Education and Admissions to the Bar in Pennsylvania", 25 *Temple Law Quarterly* 249 (January, 1952).

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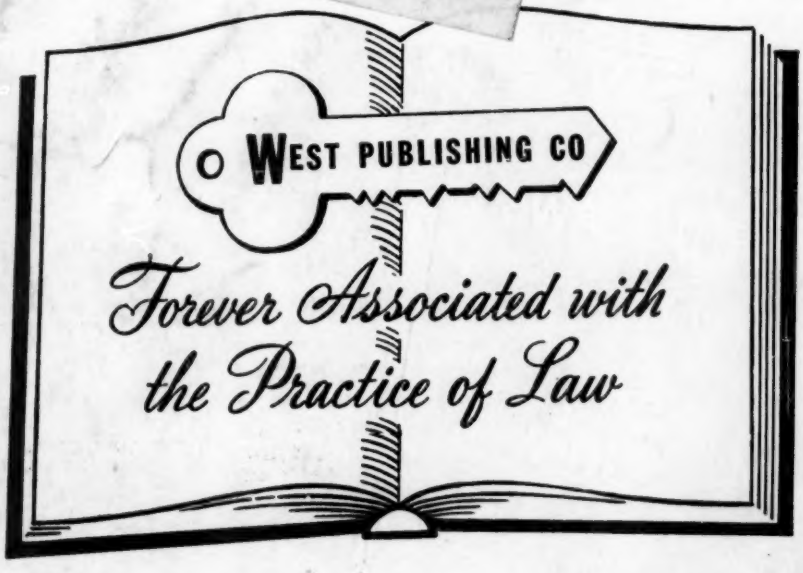

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